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Supreme Court, U.S.
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In The

Supreme Court of the United States

ANGELA PERRY
AND MICHAEL GREEN,

Petitioners,

v.

MAV MIRFASIHI, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED,
AND FLEET MORTGAGE CORP.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit correctly interpreted the Fair Credit Reporting Act ("FCRA" or the "Act"), 15 U.S.C. § 1681 *et seq.*, by holding that (1) a mortgage lender selling more than one million consumer reports was not a consumer reporting agency, and (2) the exemption for information based solely on the reporting entity's own experience with its customers also exempts customer information based on sources other than the reporter's own experience, even though these holdings would narrow the Act's scope in violation of clear congressional intent as found by this Court and contradict what every other circuit to consider the question has held.

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties.

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INTRODUCTION

This is an appeal from the approval of an abusive national class settlement paying $750,000 in attorneys' fees but nothing ($0) to 1.4 million class members for releasing their FCRA claims with statutory damages of between one hundred million and one billion dollars ($100,000,000 -- $1,000,000,000). Without discussing whether it might eliminate its subject matter jurisdiction over the case, the Seventh Circuit (Posner, J.) concluded that the FCRA class claims were "frivolous" on the grounds that (1) Fleet Mortgage Corp. ("Fleet Mortgage" or "FMC") was not a consumer reporting agency under FCRA even though it had sold more than one million consumer reports to third-party telemarketing firms, and (2) Fleet Mortgage was entitled to the exemption for information based solely on its own experience with its customers even though it furnished information based on sources other than its own experience. In an attempt to insulate its decision from review by this Court, the Seventh Circuit breached its fiduciary-like duty to protect absent class members by also concluding that the otherwise meritorious FCRA claim was waived and/or beyond the scope of remand even though the district court had interpreted the remanding decision to include the FCRA claim but made an error of law in concluding that it had no value.

Petitioners (formerly, Objectors) Angela Perry and Michael E. Green respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit approving that settlement. The terms of the

class settlement approved by the Seventh Circuit are so unfair to class members as to demonstrate inadequacy of representation under *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 621 (1997), and, if allowed to stand, would set a new standard for allowable *de minimis* settlements harming class members in all future class actions. In addition, this Court has held that FCRA should be interpreted broadly because of "the ambitious objective set out in the Act's statement of purpose," *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, ---, 127 S.Ct. 2201, 2211 (2007), but the Seventh Circuit's holding will have the practical effect of significantly narrowing the Act. In light of the division among the courts of appeals and the Seventh Circuit's failure to follow both *Amchem* and *Safeco,* the petition should be granted.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 2007 WL 2066503 (N.D. Ill. July 17, 2007), and reproduced in the appendix at App. 12. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 551 F.3d 682 (7th Cir. 2008), and reproduced in the appendix at App. 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 30, 2008, the same day its opinion issued. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Fair Credit Reporting Act ("FCRA" or the "Act") uses broad, functional definitions to impose civil liability on anyone who, acting as a credit reporting agency, issues credit reports in violation of the Act. FCRA defines a credit reporting agency as anyone who "regularly engages in . . . the practice of assembling or evaluating consumer credit or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 USC §1681a(f). FCRA defines a 'consumer report' as "any information . . . serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes." 15 U.S.C. § 1681a(d)(1).[1] A FCRA violation occurs when a consumer reporting agency furnishes a consumer report under circumstances other than those expressly set forth in 15 U.S.C. § 1681b. Where the FCRA violation is willful/reckless, the aggrieved party need not show actual damages but instead is entitled to statutory damages ranging between $100 and $1,000. 15 U.S.C. § 1681n(a)(1)(A). FCRA exempts from liability "any report containing information solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C. § 1681a(d)(2)(A)(i).

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[1] *See also* 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶4.D ("A list of names of creditworthy individuals . . . is a series of 'consumer reports' because the information bears on credit worthiness.") (Also found at LEXSTAT 16 CFR 600.1, page 3).

STATEMENT OF THE CASE

I. The Claims Underpinning This Case.

Pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), this case was brought in federal district court for alleged violations of the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, and other state laws stemming from Fleet Mortgage Corp.'s ("Fleet Mortgage") practice of selling to telemarketing firms nonpublic, personal and financial data about its customers, including mortgage account numbers, current loan balances and phone numbers without their knowledge or consent. Fleet Mortgage also provided telemarketing firms with specific information about the consumer's mortgage account, such as original loan amounts, current loan balances, monthly payments, loan origination dates and loan maturity dates. Most importantly for the purposes of the FCRA claim, Fleet Mortgage reported to the telemarketing firms that each of its customers had qualified for and received a mortgage based at least in part on information provided by the customer, *e.g.*, mortgage applications and credit reports, that was not based solely on Fleet Mortgage's relationship with the customer. Telemarketing firms used the information contained in this prescreened list to sell Fleet Mortgage customers insurance, memberships in various clubs that claim to offer discounts on services such as car maintenance, lawyers' fees and, ironically, privacy protection.

II. The Proposed and Rejected First and Second Class Settlements

This case has had a tortured procedural history as Plaintiff Mirfasihi and Fleet Mortgage (the "settling parties") have three times attempted to settle the case on a class-wide basis seeking the broadest imaginable release from and offering no recovery to 1.4 million members of the class, while the Petitioners-Objectors have challenged each of those *de minimis* settlements.

On July 31, 2002, the settling parties filed a joint motion to preliminarily approve a class action settlement ("First Settlement"). On August 2, 2002, the District Court preliminarily approved the First Settlement. On October 30, 2002, Petitioners-Objectors Michael Green and Angela Perry moved to intervene to object to the First Settlement. On November 27, 2002, Fleet Mortgage filed an opposition to Green's and Perry's request to be heard. On December 3, 2002, the District Court rejected Perry's objection as untimely. On December 4, 2002, the District Court denied Green's motion to intervene, granted final approval of the First Settlement, and granted the settling parties' request that the court impose a $3.15 million bond requirement on anyone who sought to appeal the court's approval order. On January 8, 2003, Green and Perry appealed the approval of the First Settlement and challenged the bond requirement. On January 29, 2004, the Seventh Circuit reversed the order approving the First Settlement and remanded the case.

On May 31, 2005, the Plaintiff and Fleet Mortgage moved for final approval of a revised settlement (the "Second Settlement"). The District Court never entered an order preliminarily approving the Second Settlement, nor did the District Court conduct a fairness hearing on the settlement. Also, none of the Class members were given notice of the Second Settlement. On June 28, 2005, Green and Perry filed objections to the Second Settlement, and they moved to be appointed as interim counsel for the Class members under Fed. R. Civ. P. 23(g). On August 11, 2005, the District Court approved the settlement, overruled Green's and Perry's objections and denied their Fed. R. Civ. P. 23(g) motion. On September 8, 2005, Green and Perry appealed the approval of the Second Settlement. On June 19, 2006, the Seventh Circuit reversed the order approving the Second Settlement and remanded the case.

III. The Approved But Inadequate Third Proposed Class Settlement

In a Memorandum Decision issued July 17, 2007 (the "Approval Order"), the District Court approved the Second Settlement after the settling parties had proposed it for a second time (the "Third Settlement"), with some additional rationalizations for its low value, over the Petitioners-Objectors' objections. Shortly thereafter in a separate opinion dated September 6, 2007, the District Court awarded the Objectors attorneys' fees in the amount of $18,750 (the "Fee Order"). The Objectors appealed both the Approval Order and the Fee Order.

On December 30, 2008, the Seventh Circuit approved the Third Proposed Class Settlement despite its low value to the class based in part on valuing the Class FCRA claim at $0 on the grounds that (1) Fleet Mortgage was not a consumer reporting agency under FCRA even though Fleet Mortgage had sold over one million consumer reports to third parties (*i.e.*, the telemarketing firms), (2) the information Fleet Mortgage reported to the telemarketing firms was exempt from FCRA liability even though it included information about Fleet Mortgage's customers obtained from sources other than its own experience, and (3) the FCRA claim had been waived and/or was beyond the scope of the remand. *See Mirfasihi v. Fleet Mortgage Corporation,* 551 F.3d 682 (7th Cir. 2008) (Posner, J.) (App. at 1 *et seq.*).

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Creates an Unnecessary and Confusing Division Among the Federal Courts of Appeals on Important Issues of Federal Law.

A. Every Court To Consider the Issue Has Disagreed with the Seventh Circuit on the Definition of Consumer Reporting Agency.

FCRA defines a credit reporting agency as anyone who "regularly engages in . . . the practice of assembling or evaluating consumer credit or other information on consumers for the purpose of furnishing consumer reports to third parties." 15

USC §1681a(f). Fleet Mortgage is a consumer reporting agency within the meaning of FCRA because it assembled or evaluated 1.4 – 1.6 million consumer reports based in part on the information regarding his/her creditworthiness that each of its customers had to demonstrate in order to obtain a mortgage from Fleet Mortgage and then furnished those reports to third-party telemarketing firms. Because the telemarketing firms intended to use these consumer reports to determine whether Fleet Mortgage's customers were eligible for certain types of personal insurance and/or credit transactions, the sale of their personal financial information falls under FCRA. *See* 15 U.S.C. §1681a(d)(1) ("'consumer report' means . . . any information . . . serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes").

While the Seventh Circuit apparently believed that Fleet Mortgage could not be a consumer reporting agency simply because it was a "bank," *Mirfasihi,* 551 F.3d at 686 (App. at 7), every other court to consider the issue has correctly interpreted the Act's definitions more broadly. *See, e.g., Hodge v. Texaco, Inc.,* 975 F.2d 1093, 1095-96 (5th Cir. 1992) ("Admittedly, the extension of FCRA to a drug-screening reports case seems far from the original purposes behind the Act. However, Congress has enacted this statutory language which covers a broad range of conduct by its very terms. We cannot depart from the plain language of this statute on the basis that Congress must not have meant what it said. Accordingly, we conclude that workplace drug test reports are not categorically excluded from coverage

under the FCRA."); *Owner-Operator Independent Driver Ass'n, Inc. v. Usis Commercial Services, Inc.*, 410 F.Supp.2d 1005, 1009 (D. Colo. 2005) ("Clearly, the employer motor carriers are consumer reporting agencies under this expansive definition. The cases on which defendant relies are inapposite. *See Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985) (retailer which issued single report on consumer not a crediting reporting agency under the FCRA); *Rice v. Montgomery Ward & Co.*, 450 F.Supp. 688, 670 (M.D.N.C. 1978) (defendant which obtained credit reports on plaintiff for use in litigation not a consumer reporting agency under the FCRA). Unlike the defendants in *Rush* and *Rice,* who were sought to be held liable for isolated instances of issuing or obtaining a consumer report, the motor carriers who supply defendant with the Termination Report forms do so regularly and for a fee."). In fact, the case the Seventh Circuit relied upon in concluding that Fleet Mortgage was not a consumer reporting agency is clearly distinguishable from the facts of our case. *See Mirfasihi,* 551 F.3d at 686 (App. at 7) (citing *Frederick v. Marquette National Bank,* 911 F.2d 1, 2 (7th Cir. 1990), even though it held only that a lender was not a credit reporting agency when it engaged in single transaction with a single consumer).[2]

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[2] *See also Friend v. Ancillia Systems, Inc.*, 68 F.Supp.2d 969, 974 (N.D. Ill. 1999) (holding that law firm was not a consumer reporting agency where it was not "regularly engaging in the practice of assembling credit information"); *Oldroyd v. Assocs. Consumer Discount Co.*, 863 F.Supp. 237, 241 (E.D. Pa. 1994) (lender was not a credit reporting agency when it only reported information about loan payments between a single consumer and itself).

B. Every Court To Consider the Issue Has Disagreed with the Seventh Circuit on the Scope of the §1681a(d)(2)(A)(i) Exemption.

No circuit or district court to consider the scope of § 1681a(d)(2)(A)(i) has held, as the Seventh Circuit held in this case, that the exemption applies to an entity (such as Fleet Mortgage) transmitting credit information (that Fleet Mortgage had determined its customers were sufficiently credit worthy to receive a loan secured by a mortgage) to third parties (telemarketing firms). Fleet Mortgage had to rely on information existing prior to its relationship with its customers in deciding whether to make a loan and accept a mortgage from each in the first place. For example, mortgage lenders routinely rely upon personal financial information provided by the mortgagor-candidate as well as credit reports in determining whether to loan money in exchange for a mortgage. Therefore, when Fleet Mortgage sold a list of its mortgagors to third parties, as it did here, that list contained information in addition to what Fleet Mortgage had learned solely from its direct relationship with each mortgagor. When faced with this question, the other circuits have concluded that the § 1681a(d)(2)(A)(i) exemption does not apply where at least some of the transmitted information was acquired outside of the direct relationship with the reporter.

Nunnally v. Equifax Information Services, LLC., 451 F.3d 768, 773 (11th Cir. 2006) held "that the 'transactions or experiences' exception exempts any report "based solely on [the reporter's] own

experiences with one of its customers . . . not reports that include "information furnished by third parties to credit reporters" (citations omitted); *see also Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1095 (5th Cir. 1992) (stating that the exception applies to reports based on "first-hand experience ..., not on information gathered from outside sources"). Contrary to the Seventh Circuit, the Eleventh Circuit held that the § 1681a(d)(2)(A)(i) exemption does not apply to information that contains in part information provided by third parties:

> The letters from Equifax did not contain information solely about first-hand experiences of Equifax with the Nunnallys and Rhodes. The letters provided information reported to Equifax by third parties, such as JC Penney/Monogram, First USA Bank, CBS Collection Division, Homecomings Financial Network, and others. These letters are not excluded from the definition of a "consumer report."

Nunnally v. Equifax Information Services, LLC., 451 F.3d 768, 773 (11th Cir. 2006). Similarly, in holding that the sort of information at issue here is a consumer report unless shared among affiliates (which is not this case), the Ninth Circuit has concluded that the § 1681a(d)(2)(A)(i) exemption does not otherwise apply to such information. *See American Bankers Ass'n. v. Gould*, 412 F.3d 1081, 1087 (9th Cir. 2005).

Various district courts have reached the same conclusion. *See, e.g., Vrlaku v. Citibank*, 2005 WL 2338852 (D.N.J.,2005 Sept. 23, 2005) at *5 ("Citibank's allegedly wrongful communication arises solely from a transaction between it and the plaintiff and, therefore, is not a 'consumer report' under 15 U.S.C. § 1681a(d)(2)(A)(i))."); *Owner-Operator Independent Driver Ass'n, Inc. v. Usis Commercial Services, Inc.*, 410 F.Supp.2d 1005, 1009 (D. Colo. 2005) ("Defendant claims the Termination Report forms fall within this exception because they merely reflect transactions between the submitting motor carriers and their former employees. However, plaintiffs' complaint alleges, *inter alia,* that the Termination Report forms include not only information regarding the interactions between motor carriers and drivers, but also information about interactions between drivers and shippers. (*See* Complaint at 10, ¶ 19(a) & at 15, ¶ 20.) Accepting these allegations as true, which I must at this early junction, the forms may contain information beyond the first-hand experience of the employer. Dismissal therefore is not warranted on this basis."); *Martinets v. Corning Cable Systems, L.L.C.*, 237 F.Supp.2d 717, 720 (N.D. Tex. 2002) (holding that laboratory report is exempt consumer report so long as it contains only information based solely on transaction between testing lab and tested individual).

II. By Allowing Fleet Mortgage To Violate FCRA More Than One Million Times, the Seventh Circuit Ignored Clear Congressional Intent To Protect Consumers' Rights to Privacy and This Court's Precedent

Because "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, S.Ct. 1291, 146 L.Ed.2s 121 (2000) (internal citation and quotation marks omitted), any analysis of the FCRA claim raised here must be done in light of the congressional finding that "There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a **respect for the consumer's right to privacy.**" 15 U.S.C. §1681(a)(4) (emphasis added). When the relevant statutory language is read in light of the congressional intent that motivated its enactment, it is clear that Fleet Mortgage violated FCRA more than one million times.

First, Fleet Mortgage is a consumer reporting agency within the meaning of FCRA because it "regularly engage[d] in . . . the practice of assembling or evaluating consumer credit or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 USC §1681a(f). Here, Fleet Mortgage assembled or evaluated approximately 1.4 – 1.6 million reports containing credit or other information on its customers and sold that information to third-party telemarketing firms. The Seventh Circuit concluded that Fleet Mortgage

could not be a consumer reporting agency because it was a "bank," *Mirfasihi*, 551 F.3d at 686 (App. at 7), but that is incorrect because any entity can be a consumer reporting agency as long as it meets the Act's broad, functional definition. *See Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, ---, 127 S.Ct. 2201, 2211 (2007) (interpreting FCRA broadly based on "the ambitious objective set out in the Act's statement of purpose).

Second, the information Fleet Mortgage provided to third-party telemarketing firms that sold insurance are consumer reports under FCRA because they consisted of "any information . . . serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes." 15 U.S.C. § 1681a(d)(1). Although the telemarketing firms had used the information sold to them by Fleet Mortgage to sell insurance, among other products and services, the Seventh Circuit erred again by holding that the information Fleet Mortgage sold to telemarketing firms as exempt under Section 1681a(d)(2)(A)(i) (exempting from liability "any report containing information solely as to transactions or experiences between the consumer and the person making the report"). To the contrary, precisely because each Fleet Mortgage customer was a borrower-mortgagor, Fleet Mortgage reported information regarding each customer's creditworthiness based in part on information and/or transactions other than those involving Fleet Mortgage at the time the mortgage-backed loan was approved. *See Trans Union Corp. v. Federal Trade Commission*, 243 F.3d 809, 812 (D.C. Cir. 2001) ("consumer reports" include "lists of names

and addresses of individuals who meet specific criteria such as possession of . . . mortgages"), *rehearing denied by* 267 F.3d 1138 (D.C. Cir. 2001); 16 CFR Part 600 Appendix Commentary on § 604(3)(A) at ¶6 ("A prescreened list constitutes a series of consumer reports, because the list conveys the information that each consumer named meets certain criteria for creditworthiness.") (Also found at LEXSTAT 16 CFR 600.1, page 11); 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶5.C ("A report that would not otherwise be a consumer report may be a consumer report, notwithstanding the purpose for which it is furnished, if it includes a prior consumer report or information from consumer report files, because it would contain some information 'collected in whole or in part' for consumer reporting purposes.") (Also found at LEXSTAT 16 CFR 600.1, page 4). Therefore, when Fleet Mortgage sold information on its customers to telemarketers, it was selling "consumer reports" within the meaning of FCRA because those reports contained credit information pre-existing that customer's relationship with Fleet Mortgage and been deemed sufficiently credit worthy to become a mortgagor. *See* 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶4.D ("A list of names of creditworthy individuals . . . is a series of 'consumer reports' because the information bears on credit worthiness.") (Also found at LEXSTAT 16 CFR 600.1, page 3). A report containing solely public record information is still a "consumer report" within the meaning of FCRA so long as it meets the other criteria. 16 CFR Part 600 Appendix Commentary on § 603(d) at ¶4.E (Also found at LEXSTAT 16 CFR 600.1, page 3).

Third, Fleet Mortgage willfully violated FCRA by furnishing consumer reports under circumstances other than those expressly set forth in 15 U.S.C. § 1681b. Specifically, in "furnishing reports in connection with credit or insurance transactions that were not initiated by the consumer," 15 U.S.C. § 1681b(c), Fleet Mortgage violated the requirement that "information pertaining to a consumer ... not identify the relationship or experience of the consumer with respect to a particular creditor or other entity," 15 U.S.C. § 1681b(c)(2)(C), by identifying each consumer reported on as its own borrower-mortgagor. In addition, Fleet Mortgage has maintained throughout the course of trying to get its proposed settlement approved that it does not know the names or address of the Information-Sharing Class members. In doing so, Fleet Mortgage is admitting to another violation of the FCRA for failing to maintain its list of prescreened consumers. *See* 16 CFR Part 600 Appendix Commentary on § 609(d) at ¶11 ("A consumer reporting agency must furnish to a consumer requesting file disclosure the identity of recipients of any prescreened lists that contained the consumer's name when submitted to creditors (or other users) by the consumer reporting agency.") (Also found at LEXSTAT 16 CFR 600.1, page 22).

This Court recently concluded that liability under § 1681n(a) for "willfully fail[ing] to comply" with FCRA goes beyond "acts known to violate the Act" and includes "reckless disregard of statutory duty." *Burr*, 127 S.Ct. at 2208. The "reckless disregard" standard is met where the action

> is [1] not only a violation under a reasonable interpretation of the statute's terms, but [2] shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

Id. at 2215 (numbering added).

While it is impossible at this stage of the litigation to determine whether Fleet Mortgage knowingly or recklessly violated FCRA, the facts alleged here clearly meet the pleading requirements established by the Seventh Circuit:

> Killingsworth alleges that Household "preselected" and targeted her (among others) for its credit solicitation and accessed her credit information without her knowledge or permission for that purpose. She alleges that Household developed and approved the text and format of the solicitation, including numerous specific disclosures of credit terms and conditions that were neither clear nor conspicuous, and that it did all this willfully. This is enough factual detail to state a claim for a willful violation of the FCRA.

Killingsworth v. HSBC Bank, Nevada, N.A., 507 F.3d 614, 624 (7th Cir. 2007).

Similarly, even though the *Burr* court saw no

need for remand and further development of the factual record, *see Burr,* 127 S.Ct. at 2216, it is nevertheless the general rule that determinations of reasonableness and recklessness are typically done by a jury, *see, e.g., In re Farmers Ins. Co., Inc., FCRA Litigation,* 2008 WL 687085 at * 1-2 (W.D. Ok. 2008). Additional fact finding here is necessary because, unlike the case in *Burr* where neither defendant had anything to gain from conduct that violated the Act, Fleet Mortgage was trying to establish a business that could not be conducted without violating FCRA. Since Fleet Mortgage was selling consumer reports that had value precisely because they contained information identifying the consumers as its mortgagors, and intended to control the marketing and payment for the insurance and other products offered by the telemarketing firms through its pre-existing relationship with those mortgagors, it could not both comply with FCRA and pursue this business. Consequently, it had an economic incentive not present in *Burr* to violate the Act. Given Fleet Mortgage's self-interested economic incentive to violate FCRA and pursue this line of business, it cannot now be said as a matter of law that Fleet Mortgage "'diligently and in good faith attempted to fulfill its statutory obligations' and came to a 'tenable, albeit erroneous, interpretation of the statute.'" *Burr,* 127 S.Ct. at 2207 (quoting *Reynolds v. Hartford Financial Services Group, Inc.,* 435 F.3d 1081, 1099 (9th Cir. 2006)).

Fourth, where, as here, the FCRA violation is likely to be willful, the aggrieved party need not show actual damages but instead is entitled to statutory damages ranging between $100 and

$1,000, as well as punitive damages and attorneys' fees. *See* 15 U.S.C. § 1681n(a)(1)(A). Because Fleet Mortgage willfully violated FCRA with respect to each of the approximately 1.4 - 1.6 million consumer reports it furnished to telemarketing firms, this FCRA claim is potentially worth somewhere between $140 million (1.4 million customers times minimum statutory damages of $100 each) and $1.6 billion (1.6 million customers times maximum statutory damages of $1,000 each). As the Seventh Circuit held in a similar case, Fleet Mortgage's failure to comply with FCRA, combined with its scope of operations, make it potentially liable to the Information-Sharing Class members for in excess of one billion dollars. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("The reason that damages can be substantial, however, does not lie in an 'abuse' of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person, 15 USC § 1681n(1)(A), combined with [defendant's] decision to obtain the credit scores of more than a million persons."), *rehearing denied en banc,* Feb. 21, 2006.[3]

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[3] Congress amended the civil damage provision of FCRA after this case was filed, but that amendment does not apply here because it is not retroactive. *See Killingsworth,* 507 F.3d at 624 (concluding that "FACTA's elimination of private rights of action for § 1681m violations has an impermissibly retroactive effect when applied to claims that accrued before its December 1, 2004 effective date"), *rehearing and rehearing en banc denied* (Dec.13, 2007). The issues raised herein are still important beyond this case because the Federal Trade Commission retains the authority to prosecute FCRA violations. *See* 15 U.S.C. § 1681s.

III. Allowing This Abusive Class Settlement To Stand Would Violate *Amchem* by Unfairly Favoring Future Defendants in Class Settlement Negotiations.

A. *Amchem* Created a Balance between the Process of Balanced Settlement Negotiations and the Substance of Fair Settlement Offers That This Settlement Upsets

In rejecting the class settlement proposed in *Amchem*, this Court made the common sense observation that a class settlement is only as good as the negotiation process that produced it, focusing specifically on whether "class counsel ... could [] use the threat or litigation to press for a better offer ... and the court would face a bargain proffered for its approval without benefit of adversarial investigation." *Amchem Products, Inc.*, 521 U.S. at 621 (citations omitted). Part of that weaponry class counsel brings to the negotiation table is the ability to argue to defendant that a proposed class settlement must meet some minimum standard of fairness and adequacy in order to avoid objections and obtain court approval. *See, e.g., Amchem Products, Inc.* 521 U.S. at 619-20 (noting with approval that, when rejecting the proposed settlement, the Third Circuit "homed in on settlement terms in explaining why it found the absentees' interests inadequately represented").

When a settlement as defective as the one here has been approved by a court as influential as the Seventh Circuit and a jurist as preeminent as

Judge Posner, however, it becomes the new nationwide minimum standard for class settlements because any proposed settlement with terms similar to this one would arguably be worthy of approval as well. *See International Union, United Auto, Aerospace, and Agr. Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 628 (6th Cir. 2007) (reviewing terms of settlement to determine whether there was adequacy of representation). Based on the settlement approved here, class action defendants can now disarm class counsel (and, in turn, the court) on the grounds that class counsel can still be paid even if settling class members receive nothing, so long as class counsel is willing to surrender any arguably valuable claims as they did here. Consequently, absent class members with claims too small to litigate individually would lose their only realistic chance for a recovery on the merits. *See Amchem Products, Inc.*, 521 U.S. at 617 (1997).

B. The Seventh Circuit Approved an Abusive Class Settlement that is Defective in Many Material Respects.

1. The Information-Sharing Class Members Receive Nothing from the Settlement.

When Judge Posner evaluated the First Settlement, he identified a number defects charitably described as "questionable features." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). The most glaring among them was the fact

that the 1.4 million Information-Sharing Class members will receive nothing under the settlement – "a big fat zero." *Mirfasihi*, 356 F.3d at 785. In Judge Posner's own words, "[t]he settlement . . . sold these 1.4 million claimants down the river." *Mirfasihi*, 356 F.3d at 785. While the Seventh Circuit believed that a settlement paying 1.4 million Class members nothing for releasing their claims cannot be approved unless the claims are actually worthless, *Mirfasihi*, 356 F.3d at 785-86, the Third Settlement puts these class members in a worse position than if there was no settlement at all. It provides that the Class members must release any and all claims they might have against Fleet Mortgage and a host of other entities, some named and some unnamed, relating to Fleet Mortgage's information-sharing and telemarketing activities. The release also includes claims that were never raised in the suit, and thus which were never brought to the Class members' attention. Accordingly, in exchange for nothing, the Class members must abandon potentially successful claims that are being pursued on their behalf elsewhere, and claims that were never raised or evaluated. No economically rational person would knowingly accept this deal or pay $750,000 in attorneys' fees to the class counsel who negotiated it.

2. The Seventh Circuit Did Not Require Giving Notice of the Third Settlement to Class Members.

In an attempt to minimize the scrutiny that this abusive Third Settlement would receive, Fleet Mortgage and class counsel agreed that no notice of

the settlement would be given to Class Members and that Fleet Mortgage was entitled to terminate the settlement if it was determined that notice of the settlement would have to be given to the Information-Sharing Class members. Giving notice of the Third Settlement was necessary to disclose the following previously undisclosed material information:

1) the Second Settlement had been rejected by a federal appeals court;

2) the same attorneys who sold the Information-Sharing Class "down the river" were nevertheless allowed to negotiate the Second and Third Settlements on their behalf;

3) class counsel were conflicted from trying to improve the Information-Sharing Class's recovery on their original claims or bringing new claims for unfair settlement practices;

4) the Third Settlement purports to release new claims against additional parties that did not exist at the time notice was given;

5) the Information-Sharing Class was in a stronger bargaining position than it was initially because FMC is now judicially estopped from challenging class certification;

6) the Information-Sharing Class members who were residents of states such as Massachusetts (where there was a preexisting class action) would have a better chance of recovering something by opting out than by agreeing to the Third Settlement which gives them nothing; and

7) the Petitioners-Objectors were willing to continue to press the claims of Class members who were to receive nothing under the Third Settlement.

3. Class Counsel Receive $750,000 Even Though They Previously Sold the Class "Down the River" and Are Conflicted.

The Seventh Circuit initially held that the District Court had failed to ensure that "class counsel are behaving as honest fiduciaries for the class as a whole" because the First Settlement contained numerous material deficiencies, *e.g.*, "denial of relief to an entire class . . . the reversion of unclaimed funds to the putative wrongdoer . . . the fact that the class that was denied relief did not have separate counsel from the counsel for the favored class" and that the class notice failed to inform Information-Sharing Class members of the Massachusetts Action. *Mirfasihi,* 356 F.3d at 785. Despite this holding, it approved the Third Settlement and $750,000 in attorneys' fees for the same class counsel whose conflicts of interest fatally infected the First Settlement.

It is impossible to imagine how attorneys-fiduciaries for the Information-Sharing Class could have concluded that the Third Settlement is in the Information-Sharing Class's best interest. *See Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000) (rejecting settlement where absent class members "received nothing"); *Molski v. Gleich,* 318 F.3d 937, 953 (9th Cir. 2003) (rejecting settlement where defendant "was required to make tax deductible donations to third parties") and at 955 (settlement unfair where it "released almost all of

the absent class members' claims with little or no compensation"). In light of these unresolved conflicts and the inadequacy of the recovery, the inescapable conclusion is that the interests of the Information-Sharing Class were sacrificed so that class counsel could get paid.

The attorneys who negotiated both settlements suffered from several substantial conflicts of interest while negotiating the Third Settlement. First, class counsel had no incentive to obtain a Third Settlement that contained the improvements that the Petitioners-Objectors demanded because doing so would only show both that they inadequately represented the Class members during the negotiation of the First and Second Settlement, and that these Objectors are responsible for any improvements in the Second and Third Settlement. So, for example, current class counsel did not press the advantage they had from Fleet Mortgage being judicially estopped from challenging class certification when negotiating the Second and Third Settlement. Second, current class counsel have attempted to create the illusion that they are separately representing the Information-Sharing and Telemarketing Classes when, in reality, they are the same attorneys who represented both Classes for the First Settlement and are now all seeking to be paid out of one common fund set aside for attorneys' fees. Third, current class counsel are conflicted from pressing the Unfair Settlement Claim that arose from the settling parties' obtaining an unconstitutional and unconscionable appeal bond because, as fiduciaries for the Information-Sharing

Class which they "sold down the river," they themselves face liability for such claims.

C. In Approving the Settlement, the Seventh Circuit Deviated from the Majority Rule That It Owed a Fiduciary-Like Duty to Absent Class Members

Although well aware both that the settling "information-sharing" class was receiving nothing ($0) and that numerous Courts of Appeal "have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries," *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 280 (7th Cir. 2002) (citations omitted), the Seventh Circuit itself failed to meet that standard here. Instead of exercising the degree of care required to protect absent class members from releasing their FCRA claims in an inadequate settlement giving them $0, it erroneously concluded that those claims had been waived and/or were beyond the scope of the remand. *See Mirfasihi*, 551 F.3d at 686 (App. 5-6).

The District Court's conclusion that the FCRA claim was not waived is entirely consistent with the established law that, in order to protect the rights and interests of absent class members, a district court must "quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate." *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002). In fact, given the District

Court's independent, fiduciary-like duty to protect absent class members, the FCRA claim could not have been waived without being valued as part of valuing a proposed class action settlement.

The District Court clearly and correctly understood that valuing the FCRA claim was within the scope of the remand, *i.e.*, "to fully consider the potential value of the claims of one of the putative classes (the 'information-sharing class')." App. at 13 (citing *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745 (7th Cir. 2006)) (*"Mirfasihi II"*). Specifically, the District Court cited several passages from *Mirfasihi II* demonstrating that it was required to evaluate Petitioners-Objectors' FCRA claim. First, the District Court noted that it had been criticized for "not canvas[sing] **all potential avenues of recovery** to determine whether the information-sharing class's claims were indeed essentially hopeless (and thus worthless) under the pertinent controlling law." App. at 18 (citing *Mirfasihi II* at 747) (emphasis added). Second, it realized that "a claims analysis, under these circumstances, would require consideration of (1) the probability of the information-sharing class's having grounds for recovery under **any** applicable law." App. at 18 (citing Mirfasihi *II* at 750) (emphasis in original).

The District Court went on to value the FCRA claim but wrongly concluded that "neither the FCRA nor TILA are sound bases on which the information-sharing class may assert claims." App. at 28. This was not "harmless error" because there are somewhere between 1.4 and 1.6 million affected Fleet Mortgage customers and statutory damages

would be no less than $100 but no more than $1,000 per violation, so a successful FCRA claim here is potentially worth somewhere between $140 million (1.4 million customers times $100 each) and $1.6 billion (1.6 million customers times $1,000 each). While it is impossible and unnecessary at this stage to predict with certainty whether the FCRA claim will prevail, it is impossible to conclude as the Seventh Circuit did that, as a matter of law, the FCRA claim has no value.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 30, 2009

IN THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

NO. 07-3402

MAV MIRFASIHI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

FLEET MORTGAGE CORPORATION

APPEAL OF ANGELA PERRY AND MICHAEL E. GREEN

DATE OF JUDGMENT	12/30/2008
TRIAL JUDGE:	HON. JOAN H. LEFKOW
COURT FROM WHICH APPEALED:	U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
ATTORNEYS FOR APPELLANTS:	JOHN P. ZAVEZ TONY KIM
ATTORNEYS FOR APPELLEES:	JON W. BORDERUD CLIFFORD A. CANTOR CHRISTINA M. TCHEN
NATURE OF THE CASE:	CIVIL
DISPOSITION:	AFFIRMED
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BAUER, POSNER, AND WILLIAMS, CIRCUIT JUDGES.

POSNER, CIRCUIT JUDGE:

¶1.This class-action suit is before us for the third time; our previous opinions are reported at 356 F.3d 781 (7th Cir. 2004), and 450 F.3d 745 (7th Cir. 2006). The current appeal like the previous ones presents questions concerning class-action procedure.

¶2.The suit was brought eight years ago on behalf of approximately 1.6 million persons whose home mortgages were owned by Fleet Mortgage Corporation. The complaint charges that without their permission Fleet transmitted information about these persons' finances (plus other personal information, such as phone numbers), obtained from their mortgage files, to telemarketing companies which then, in conjunction with Fleet, used that information and deceptive practices to try to sell them financial and other services that they otherwise would not have been interested in. Fleet's transmission of the information to the telemarketers was alleged to violate, among other laws, the federal Fair Credit Reporting Act and state consumer protection statutes. Two plaintiff classes were proposed-a "pure" "information-sharing" class of 1.4 million customers of Fleet whose financial information Fleet transmitted to the telemarketers but who did not buy anything from them, and a separate "telemarketing" class composed of 190,000 customers of Fleet who made purchases from the telemarketers. The second class is not directly involved in this appeal.

¶3.The parties negotiated a settlement, which the judge approved in 2002 simultaneously with certifying the classes. But he did not explain why he thought certification proper; he merely recited the criteria in Rule 23. The settlement gave nothing to the information-sharing class, while barring its members from bringing individual suits. The treatment of that class was one of the grounds for our reversing, at the behest of two class members who had objected to the settlement and intervened in the litigation, the district court's judgment approving the settlement.

¶4.On remand the parties negotiated a new settlement, which the district court (a different judge) approved. This settlement required Fleet to pay to public interest law firms (or other charitable groups) concerned with consumer privacy the $243,000 that Fleet had earned from its sale of information to the telemarketers, plus any of the funds earmarked for the members of the telemarketing class that ended up being unclaimed, minus, however, considerable expenses. As far as the information-sharing class was concerned, the basis of the district judge's approval of the new settlement, which again gave that class nothing, was that the value of the class members' claim was zero: they had no chance of obtaining damages if the case went to trial and judgment.

¶5.We again reversed at the behest of the objecting class members, ruling that the district judge had not made an adequate effort to value the claims of the information-sharing class. Among other things, she

had considered the consumer protection statutes of only a few states, even though there were members of the information-sharing class in every state.

¶6. On remand she conducted a more complete survey of state law and again concluded that the claims had no value. The objecting class members again appeal, arguing not only that the claims have value (perhaps in excess of a billion dollars!) but also that the objectors should have been awarded a much larger legal fee than the $18,750 that the judge awarded them.

¶7. There is no evidence that any members of the information-sharing class suffered any harm from Fleet's disclosing information about them to telemarketers. Nineteen states plus the District of Columbia, however, permit an award of statutory damages, ranging from $25 in Massachusetts to $10,000 in Kansas but averaging $1,046.25, for violations of their consumer protection statutes. (These figures are based on a table in the supplemental appendix to the appellees' brief in this court, and are not contested by the appellants. We exclude two states, California and Idaho, that allow a $1,000 award of statutory damages in a class action only to the class as a whole.)

¶8. It is arguable that the unauthorized disclosure of financial information violated those statutes. But the statutes do not permit the award of such damages in a class action. The objectors do not challenge the application of that limitation to a class action filed in federal district court. Yet we have held that unless based on state substantive law such a limitation does

not bind a federal court in a class action litigated in that court. ***Thorogood v. Sears, Roebuck & Co.***, 547 F.3d 742, 746 (7th Cir. 2008). Having failed to preserve the issue, the objectors cannot invoke that ruling-and anyway they haven't tried to.

¶9.They do argue that even if the claims of the members of the information-sharing class have no value in a class action, they have value in individual actions. A number of states do as we just noted authorize statutory damages in such actions, and conceivably some of the 1.4 million members of the class (not all of whom live in such states, however) would sue if not precluded by the settlement. That preclusion is a benefit to Fleet, and the objectors argue that Fleet should pay the class for it. But after eight years of litigation, the objectors are unable to identify a single member of the class who would sue on his own dime to collect the modest statutory damages available in an individual suit. Cf. ***Id.*** at 747.

¶10. The objectors point out that state consumer protection laws to one side, the federal ***Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq.***, authorizes the award of statutory damages of not less than $100 or more than $1000 for a willful violation of the Act, without need to prove harm. § 1681n(a)(1)(A); see ***Safeco Ins. Co. v. Burr***, 551 U.S. 47, 127 S.Ct. 2201, 2206, 167 L.Ed.2d 1045 (2007); compare § 1681o(a). But although the Act was mentioned in the complaint, the objectors first sought to apply it to the information-sharing class after our first remand. That was too late. ***United States v. Husband***, 312 F.3d 247, 251 (7th Cir.

2002) (a party " 'cannot use the accident of remand as an opportunity to reopen waived issues' "). On the second appeal, which followed that remand, the parties to the settlement pointed out that the objectors had indeed forfeited their claim under the Act. We did not discuss the Act in our second opinion, but implicitly excluded it from further consideration by stating that "on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law." 450 F.3d at 751 (emphasis added).

¶11. On remand, the district judge nevertheless discussed (and rejected) the applicability of the Act to the class. She should not have wasted her time on the issue. ***United States v. Husband,*** *supra,* 312 F.3d at 251. The objectors argue that the scope of the remand was ambiguous; it was not; but if the objectors thought it was, or, more plausibly, wanted us to reconsider the scope of the remand, they should have petitioned us for clarification or reconsideration, and they did not. Had they done so, the parties to the settlement would have argued forfeiture and lack of merit, and we would have ruled against the objectors and cut off further litigation on the issue, saving the district judge time and the parties cost. For besides having been forfeited, the claim that Fleet violated the Fair Credit Reporting Act has no possible merit, and in fact is frivolous.

¶12. The Act regulates "consumer report[s]" issued by "consumer reporting agenc[ies]." 15 U.S.C. § 1681a(d)(1). A consumer reporting agency, so far as pertains to this case, is "any person which ... regularly engages in whole or in part in the practice

of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." § 1681a(f). Fleet does not regularly engage in such practices; it is not a consumer reporting agency-it is a bank. ***Frederick v. Marquette National Bank***, 911 F.2d 1, 2 (7th Cir. 1990). "Consumer reporting agencies naturally depend on suppliers of credit to furnish them with credit information. It is the consumer reporting agency that is charged with assuring the accuracy, confidentiality and proper dissemination of this information, however. The [Fair Credit Reporting Act] does not impose obligations upon a creditor who merely passes along information concerning particular debts owed to it." ***DiGianni v. Stern's***, 26 F.3d 346, 349 (2d Cir. 1994).

¶13. Furthermore, "a creditor who merely passes along information concerning particular debts owed to it" is not a purveyor of "consumer reports." For excluded from the definition of consumer report is a "report containing information solely as to transactions or experiences between the consumer and the person making the report." § 1681a(d)(2)(A)(i). What Fleet sold the telemarketers was "information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report [Fleet]." See ***DiGianni v. Stern's***, *supra*, 26 F.3d at 349; ***Smith v. First National Bank***, 837 F.2d 1575, 1578 (11th Cir. 1988) (per curiam).

¶14. So the claims of the information-sharing class are indeed worthless, and if so even $243,000 might

seem excessive compensation-and the amount will grow if not all the settlement money allocated to the telemarketing class is claimed by members of the class-and maybe therefore those claims ought simply to be dismissed. But even if the settlement is merely a nuisance settlement, such settlements are permitted; defendants can be trusted to make such settlements only if it is in their best interest to do so.

¶15. We are disheartened that the litigation by the information-sharing class has been allowed to drag on for eight years, when it had no merit-and that as a matter of law, without need to take evidence. It is an example of the typical pathology of class action litigation, which is riven with conflicts of interest, as we discussed recently in ***Thorogood v. Sears, Roebuck & Co.***, *supra*, 547 F.3d at 744-46. The lawyers for the class could not concede the utter worthlessness of their claim because they wanted an award of attorneys' fees. The lawyers for Fleet were reluctant to argue the utter worthlessness of the claim because they were able to negotiate a settlement that cost their client virtually nothing-provided they did not take such a strong stand that it jeopardized the class lawyers' shot at a generous award of attorneys' fees, and hence the settlement. And the objectors were motivated to exaggerate the value of the claim of the information-sharing class so that they could get a generous award of attorneys' fees. At the very outset of the case, before certifying the class, the district court should have required the parties to present the belatedly presented survey of the consumer protection laws of the 50 states, plus argument concerning the scope of the Fair Credit Reporting Act, to demonstrate the existence of a

colorable claim.

¶16. With what can only be described as *chutzpah,* defined by Leo Rosten as "gall, brazen nerve, effrontery, incredible 'guts,' presumption plus arrogance such as no other word and no other language can do justice to," the objectors ask us to substitute them for the lawyers for the information-sharing class and award them the entire $750,000 in attorneys' fees that the district judge awarded those lawyers; in other words, the objectors are asking us for 40 times the $18,750 attorneys' fee that she awarded them. The request is preposterous.

¶17. It is true that they twice prevailed on appeal and that the sequel to the first appeal was a genuine improvement in the settlement with respect to the telemarketing class. But the sequel to the second appeal was only a very slight improvement in the settlement with respect to the information-sharing class; and it was an improvement less because the $243,000 went to charity, rather than to the other class, than because that figure may grow (though only to a maximum of $804,000, because of the expenses we mentioned). The benefit to the information-sharing class would still be meager no matter how much money went to a public interest law firm or a charity rather than to the members of the class.

¶18. As important to a proper evaluation of the objectors' contribution as the meagerness of the relief that they obtained by extending the litigation by several years is their lack of constructive activity in the district court. They did not propose terms of

settlement or otherwise participate constructively in the litigation other than to appeal. A proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred. See, e.g., ***Farrar v. Hobby***, 506 U.S. 103, 114-15, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); ***Hensley v. Eckerhart***, 461 U.S. 424, 435-37, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); ***Cole v. Wodziak***, 169 F.3d 486, 487-88 (7th Cir. 1999). The success obtained by the objectors was meager, as we have said, and the cost incurred-unknown. The fee applications that they submitted to the district court were barren of the detail required for an assessment of that cost. Moreover, the district judge initially determined their fee to be $37,500, and only later cut it in half as a sanction for their irresponsible litigation tactics (paralleled in this court by the many inaccurate and misleading statements in their briefs and post-argument submission) that exasperated a very patient district judge.

¶19. We are mindful that "it is desirable to have as broad a range of participants in the [class action] fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally," and that "this participation is encouraged by permitting lawyers who contribute materially to the proceeding to obtain a fee." ***Reynolds v. Beneficial National Bank***, 288 F.3d 277, 288 (7th Cir. 2002). But "the principles of restitution that authorize such a result also require ... that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class." ***Id.*** The improvement that the objectors

produced in this case, minus the detriment caused by their courtroom antics, barely justified the modest fee that the judge awarded them.

¶20. This case is *finito.*

¶21. **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT, N.D. ILLINOIS, EASTERN DIVISION

NO. 01 C 722

MAV MIRFASIHI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

v.

FLEET MORTGAGE CORPORATION

ANGELA PERRY AND MICHAEL E. GREEN, INTERVENORS.

DATE OF JUDGMENT:	July 17, 2007
TRIAL JUDGE:	Joan H. Lefkow
COURT FROM WHICH APPEALED:	
ATTORNEYS FOR PLAINTIFF:	Kevin M. Prongay, Jon W. Borderud, Daniel Francis Lynch Taher Kameli Tanya M. Stippich Oren S. Giskan
ATTORNEYS FOR DEFENDANT:	Christina M. Tchen FrancisNeilMcDonald Ryan James Rohlfsen JohnNicolas Albukerk Andrew L. Sandler Gary DiBianco
NATURE OF THE CASE:	Civil
DISPOSITION:	Dismissed
MOTION FOR RE HEARING FILED:	
MANDATE ISSUED:	

LEFKOW, JUDGE:

MEMORANDUM DECISION

¶1.This is the third time that a proposed settlement of this putative class action case is before the district court for approval. The parties are plaintiff Mav Mirfasihi on behalf of himself and all others similarly situated ("plaintiffs") and defendant Fleet Mortgage Corporation ("FMC"). The first time a settlement was before the court was in 2002, when Judge Norgle approved the original settlement. Dkt. No. 88 (Dec. 4, 2002). The Seventh Circuit reversed and remanded the case on January 29, 2004. ***Mirfasihi v. Fleet Mortgage Corp.,*** 356 F.3d 781 (7th Cir. 2004) (*"Mirfasihi I"*). On remand, this court granted the motion of Angela Perry and Michael E. Green ("the intervenors") to intervene. Dkt. No. 122 (Nov. 17, 2004). The parties returned to the bargaining table and came up with the Second Proposed Class Action Settlement ("the Settlement"), which this court approved on August 11, 2005. Mem. Decision, Dkt. No. 170 (Aug. 11, 2005). That decision was appealed as well and the Seventh Circuit again reversed and remanded, although this time the scope of remand has been narrowed to a single issue: to fully consider the potential value of the claims of one of the putative classes (the "information-sharing class"). ***Mirfasihi v. Fleet Mortgage Corp.,*** 450 F.3d 745 (7th Cir. 2006) (*"Mirfasihi II"*). The intervenors have filed another objection to the Settlement. Class Members and Twice-Prevailing Objectors Michael Green and Angela Perry's Second Objection to the Second Proposed Class Action Settlement [Dkt. No. 195] ("Second Objection"). For the reasons that

follow, the Second Proposed Class Action Settlement [# 146] is again approved and the intervenors' Second Objection [# 195] is denied.

BACKGROUND

¶2.The court assumes familiarity with its August 11, 2005 Memorandum Decision and with the proceedings of this case and provides the following background only to give the necessary context for this opinion. This lawsuit was brought on behalf of approximately 1.6 million people whose home mortgages were owned by Fleet Mortgage Corporation ("FMC"). ***Mirfasihi I,*** 356 F.3d 781, 782 (7th Cir. 2004). Plaintiffs allege that, without their permission, FMC transmitted information that it had obtained from the mortgage papers regarding their financial needs to telemarketing companies which then, in conjunction with FMC, used that information and deceptive practices to attempt to sell unwanted financial services to FMC customers. ***Id.*** Plaintiffs allege that FMC's conduct violated the ***Truth in Lending Act, 15 U.S.C. § 1601 et seq.*** ("TILA"), ***the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.*** ("FCRA"), ***the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102***, and state consumer protection laws and common law protections against invasions of privacy.

¶3.Judge Norgle's order certified two classes for purposes of settlement: the "telemarketing class" (approximately 190,000 members) and the "information-sharing class" (approximately 1.4 million members), and the Seventh Circuit has left

these classes undisturbed. Mem. Decision of Aug. 11, 2005, at 8-9; ***Mirfasihi I,*** 356 F.3d at 782. The telemarketing class is composed of the following:[1] (1) all FMC customers outside of Minnesota and California who were billed on their mortgage account statements and paid for a telemarketed membership product or service and did not consent to such charges; and (2) all FMC customers nationwide who were billed on their mortgage account statements and paid for a telemarketed accidental death insurance policy and did not consent to such charges.[2] ***Id.*** The information-sharing class is composed of all FMC customers whose mortgage information was shared with unaffiliated third parties in order to allow those parties to offer products, services, or insurance to FMC customers in the six years preceding the filing of this lawsuit, but who did not buy anything from the telemarketers. ***Id.*** The telemarketing class received individual notice of the original settlement, while the information-sharing class received notice of the original settlement by the publication of a notice in *USA Weekend*. ***Id.***

¶4.The basic terms of the Settlement are as follows. The telemarketing class is eligible for certain monetary relief.[3] For the information-sharing class,

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[1] This current definition is almost but not completely identical to the original definition. The differences are not material to this opinion.

[2] The telemarketing class does not include present and former employees of FMC and FleetBoston Financial Corp.

[3] The proposed Settlement affords those members of the telemarketing class who previously submitted a timely Claim Form in connection with the original settlement the following:

FMC has agreed to disgorge the $243,000 it received from selling the information to unaffiliated third parties and to make a charitable contribution in that amount to the Electronic Privacy Information Center, a public interest research center devoted to privacy education and protection, and/or other charitable institutions devoted to consumer privacy concerns to be determined by mutual agreement of the parties and approved by the court. The

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(1) Any member of the telemarketing class who certified that he or she did not consent to enrollment in a membership product or service offered by telemarketing or accidental death insurance policy offered by telemarketing, and was still being charged for such a product, service or policy, may cancel the product, service, or policy without penalty.

(2) Any member of the telemarketing class who certified that he or she did not consent to enrollment in a membership product or service offered by telemarketing, and was charged for a membership product or service for less than six months, will receive a refund of $10.

(3) Any member of the telemarketing class who certified that he or she did not consent to enrollment in a membership product or service offered by telemarketing and was charged for a membership product or service for more than six months, will receive a refund of 25% of the monthly charges for each month enrolled up to 18 months. Under this formula, the maximum refund for any single product is estimated to be $135.

(4) Any member of the telemarketing class who certified that he or she did not consent to the purchase of an accidental death insurance policy offered by telemarketing, and was charged for accidental death insurance for less than one year, will receive a refund of $12.50

(5) Any member of the telemarketing class who certified that he or she did not consent to the purchase of accidental death insurance offered by tele marketing, and was charged for accidental death insurance for more than one year, will receive a refund of $25.

information-sharing class will not receive a direct payment in any form.

¶5. FMC's maximum payment under the various provisions is $2.4 million, which is exclusive of fees and expenses. After subtracting any amounts paid to satisfy the claims of any class members, including class counsel's fees, any class notice, and costs, whether in the present litigation or otherwise, and subtracting all the amounts FMC paid to settle a related California action, including class counsel's fees and expenses,[4] the balance will be paid to the Electronic Privacy Information Center and/or other charitable institutions devoted to consumer privacy concerns. There will be no reversion of any portion of the $2.4 million to FMC.[5]

¶6. In its 2006 decision, the Seventh Circuit said that "the district court properly analyzed (and disposed of) the objectors' ... complaints not relating to the information-sharing class's claims evaluation and we need not address those issues here (nor need the

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[4] FMC has represented that this amount is $304,696.

[5] Excluded from entitlement to any payment are any FMC customers who, prior to the settlement, received a full refund for any amounts paid for a telemarketed membership product or service or telemarketed accidental death insurance policy, as well as present and former FMC customers with addresses in Minnesota and California who received any refund for membership fees pursuant to the settlement agreements in the Minnesota action and the California action, respectively. In addition, any FMC customer who already received a partial refund for any amounts paid for a telemarketed membership product or service or telemarketed accidental death insurance policy, will have any refund under the settlement agreement reduced by the amount of the past refund.

district court revisit them upon remand." ***Mirfasihi II,*** 450 F.3d 745, 749 n. 1 (7th Cir. 2006). It found, however, that this court "failed to consider with adequate specificity the reasonableness of an entire class receiving a 'big fat zero' in the settlement. Specifically, [this] court did not canvas all potential avenues of recovery to determine whether the information-sharing class's claims were indeed essentially hopeless (and thus worthless) under the pertinent controlling law." ***Id.*** at 747."The analysis should have considered, at a minimum, the pertinent consumer protection statutes (and other potential bases for claims) in the states where the information-sharing class members resided." ***Id.*** at 749."In any event, in basic terms, a claim analysis under these circumstances would require consideration of (1) the probability of the information-sharing class's having grounds for recovery under *any* applicable law; (2) the probability of such favorable law applying to the entire information-sharing class (rather than differing subsets); and (3) the probability of winning on the merits." ***Id.*** at 750."Thus, on remand, [this] court should consider and analyze the full cross-section of potentially applicable state law and arrive at a clearer estimate of the potential value of the information-sharing class's claims to allow proper evaluation of the reasonableness of the proposed settlement." ***Id.*** at 751.

ANALYSIS

¶7.In their "Second Objection to the Second Proposed Class Action Settlement," the intervenors raise several arguments against approving the Settlement, most of which are the same as arguments that they

have raised at least once before.[6] First, they argue that the plaintiffs' claims have value because FMC's conduct constitutes a *per se* violation of all state consumer protection statutes that are based on the ***Federal Trade Commission Act, 15 U.S.C. § 45 et. seq*** ("FTC Act"). Second, the intervenors argue that plaintiffs' federal law claims under TILA and the FCRA have value. They suggest that the plaintiffs might have a claim under TILA based on FMC's nondisclosure of telemarketing charges on its mortgage statements to customers. The intervenors also contend that FMC violated the FCRA, arguing that FMC is a "credit reporting agency" that assembled "credit reports" and that the telemarketing firms used those reports to determine whether FMC's customers were eligible for personal insurance or credit transactions.[7] Third, the intervenors have again raised their "new" claim against FMC for attempting to settle this case "in a manner than violated due process and was substantively unfair." Second Objection, at 9. This is again based primarily on FMC's support for the requirement of an appeal bond of $3.15 million after the original settlement was approved in 2002. Finally, the intervenors complain that class counsel have a conflict of interest and that new individual class notice should be provided to the information-sharing class.

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[6] In fact, some of their arguments were lifted from their first Objection to the Second Proposed Class Action Settlement, filed on June 28, 2005. Dkt. No. 157.Compare Objection, Dkt. No. 157 (June 28, 2005), at 14, with Second Objection, Dkt. No. 195 (Sept. 29, 2006), at 4.

[7] These federal law arguments are the only arguments that have not been raised before.

¶8.In response, FMC and the plaintiffs argue that many of the intervenors' arguments are outside the scope of the Seventh Circuit's remand. Additionally, they emphasize their key points that the information-sharing plaintiffs cannot recover because, *inter alia,* they have not suffered any actual damages and the information that FMC sold was already a matter of public record. FMC and the plaintiffs conclude that the information-sharing plaintiffs' claims appear to be meritless, and therefore the Settlement should be approved again.

¶9.This court took the suggestion of the Seventh Circuit and "request[ed] additional briefing ... to obtain greater information and analyses pertinent to claims evaluation in this case ."***Id.*** at 751.Plaintiffs and FMC have each provided the court with comprehensive 50-state surveys of state consumer protection and privacy law.

A. State consumer protection statutes

¶10. The intervenors argue that the plaintiffs' claims have value because FMC's conduct constitutes a *per se* violation of all state consumer protection statutes that are based on the FTC Act. From that premise, they conclude that the members of the information-sharing class are entitled to millions of dollars in statutory damages. As is ably shown by FMC and the plaintiffs, however, the intervenors have ignored critical elements of the consumer protection laws that defeat their class action claim for statutory damages.

¶11. Most critically, the information-sharing plaintiffs have not suffered any damages as a result of FMC's conduct. Mem. Decision, Dkt. No. 170, at 11.On the contrary, the intervenors concede that the information that FMC disclosed about the plaintiffs was already a matter of public record.[8] ***Id.*** In states that allow for the recovery of statutory damages in class actions (of which there are only seven plus the District of Columbia), plaintiffs must still plead and prove actual injury, ascertainable loss, or damage in order to be entitled to recover statutory damages.

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[8] The intervenors state without explanation that FMC disclosed "*nonpublic* personal and/or financial information."*See, e.g* ., Intervenors' Second Objection to the Second Proposed Class Action Settlement, at 1 (emphasis added). Similarly, they say that the information-sharing class "suffered actual money damages from the sale of its personal information as measured, for example, by disgorgement of the profits Fleet received for selling such information."***Id.*** at 4; *see also* ***Id.*** at 8 n. 3; 13. Profits made by FMC, however, are not a proper measure of damages to the plaintiffs in this context. Despite the fact that FMC and the plaintiffs have strongly emphasized the importance of these facts, both in the briefing that took place in 2005 and in the current set of briefs, and this court focused on the plaintiffs' lack of actual damages in its August 11, 2005 opinion approving the Settlement, ***see*** Memorandum Decision [Dkt. No. 170], at 11-12, 14, the intervenors have still failed to allege any concrete or specific damage or injury to any named information-sharing plaintiff. This persistent omission qualifies as a judicial admission that no actual damages have occurred, which has the effect of removing the fact from contention. ***Clark v. Robert W. Baird Co., Inc.,*** 152 F.Supp.2d 1040, 1045 (N.D.Ill. 2001) (citing ***Keller v. United States,*** 58 F.3d 1194, 1199 n. 8 (7th Cir. 1995); ***American Title Ins. Co. v. Lacelaw Corp.,*** 861 F.2d 224, 227 (9th Cir. 1988)). The intervenors' references to the Seventh Circuit opinions and to FMC's "admissions," see Second Objection, at 4, do not stand for the propositions for which they are cited.

FMC's Brief in Further Support of the Parties' Class Action Settlement After Limited Remand from the Seventh Circuit ("FMC's Brief"), at 5, Ex. A; Plaintiffs' Brief Addressing the Remanded Issue of Valuation of Information-Sharing Class Claims ("Plaintiffs' Brief"), at 7-8, Ex. 1.

¶12. Massachusetts's consumer protection law, Mass. Gen. Laws Ch. 93A, § 9, on which the intervenors rely, falls into this category. It provides, "Any person ... who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two ... may bring an action ... for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper." Mass. Gen. Laws Ch. 93A, § 9(1)."[I]f the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two." ***Id.*** at § 9(3). Although the Massachusetts Supreme Court case ***Leardi v. Brown,*** 394 Mass. 151, 474 N.E.2d 1094 (Mass.1985), suggests that the information-sharing plaintiffs might have a viable claim even without proof of actual damages, later cases have made it clear that Massachusetts's law requires proof of at least some loss or adverse effect, even if not economic. *See* ***Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.,*** 445 Mass. 790, 802, 840

N.E.2d 526, 535 (Mass. 2006) ("Every consumer is, of course, entitled to the full protection of law. If any person invades a consumer's legally protected interests, and if that invasion causes the consumer a loss-whether that loss be economic or noneconomic-the consumer is entitled to redress under our consumer protection statute. A consumer is not, however, entitled to redress under G.L. c. 93A, where no loss has occurred. To permit otherwise is irreconcilable with the express language of G.L. c. 93A, § 9, and our earlier case law."); *see also* ***Chapman v. Katz,*** 448 Mass. 519, 536-37, 862 N.E.2d 735, 749 (Mass. 2007).[9]

¶13. In this case, the intervenors (and the plaintiffs) have had ample opportunity to allege that an injury or loss occurred but have not done so. For example, no information-sharing plaintiff has alleged that he spent any time preventing or undoing any harm caused by FMC's conduct or that he was otherwise injured in any way. Because the information disclosed was already a matter of public record, there was no reason to "recover" it, and FMC's disclosure could not have caused any harm. The plaintiffs have no viable claim in Massachusetts or the states like it.

¶14. The information-sharing plaintiffs' claims are not viable under any other state's consumer protection laws either, for various reasons. Some

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[9] The court takes note of ***Kuhn v. Capital One Fin. Corp.,*** 2006 WL 3007931, 67 Mass.App.Ct. 1111 (Mass. App. Ct. Oct. 23, 2006), an unpublished opinion cited by the intervenors. The court need not decide whether this case can be relied on because in any event it is consistent with the cases cited above.

states do not provide statutory damages at all for violation of their consumer protection laws; some do not allow private class actions for statutory damages; and in some states, the statute of limitations has run for any potential claims that plaintiffs could make. In many states more than one of these limitations apply. *See* FMC's Brief, at 3-6, Ex. A (50 state survey); Plaintiffs' Brief, at 6-12, Ex. 1 (50 state survey). The intervenors do not challenge the accuracy of the parties' surveys and after careful and thorough review, the court finds them to be accurate, comprehensive, and very helpful and commends FMC and the plaintiffs for their work. The court therefore concludes that the information-sharing plaintiffs do not have a viable claim under any state's consumer protection law.

B. State privacy laws and common law protections

¶15. The intervenors do not address the applicability of state privacy laws to the information-sharing class, but FMC persuasively argues that any such claims would be meritless. It is supported by the reasonable idea that "the interests in privacy fade when the information involved already appears in the public record." ***Cox Broad. Corp. v. Cohn,*** 420 U.S. 469, 494, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); ***Connick v. Myers,*** 461 U.S. 138, 143 n. 5, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (citing ***Cox*** as holding that an "action for invasion of privacy cannot be maintained when the subject-matter of the publicity is matter of public record.").

¶16. Actions for invasion of privacy take various forms but none of them fits well with the facts at

issue here. The first, "publication of private facts," generally requires that the plaintiff show that the defendant gave publicity to matters concerning private life, when such publication would be highly offensive to a reasonable person, and where the facts are not of legitimate concern to the public. FMC's Brief, at 8 (citing the Restatement (Second) of Torts § 652D). Because the information that FMC disclosed was already a matter of public record, the plaintiffs cannot maintain a claim that FMC publicized private facts. *See* FMC's Brief, at 7-8, Ex. C; Restatement (Second) of Torts § 652(D) cmt. b ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record ..."). The second form of invasion of privacy, "intrusion upon seclusion," also does not provide the plaintiffs with a viable claim. This generally requires a showing that the defendant intruded on the plaintiffs' seclusion or private affairs in a way that would be highly offensive to a reasonable person. FMC's Brief, at 10 (citing the Restatement (Second) of Torts § 652B). As noted in the comments to the Restatement, however, and as held by many state courts, "there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. "Restatement (Second) of Torts § 652B cmt. c; *see also* FMC's Brief, at 10-11, Ex. C.

¶17. The final form of invasion of privacy, appropriation of name or likeness, requires a showing that the defendant appropriated the

plaintiff's name or likeness without consent for its own benefit. FMC's Brief, at 14 (Citing Restatement (Second) of Torts § 652C). As explained in the comments to the Restatement, "[t]he common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose."Restatement (Second) of Torts § 652C cmt. b. The facts involved here, where FMC sold a list of plaintiffs' names and some financial information about them, do not fit within this paradigm; FMC did not purport to use any of plaintiffs' names or likenesses to endorse its product. There is no indication that any of plaintiffs' names were intrinsically valuable or well known; instead, the value of FMC's list was due to the fact that plaintiffs' names and information were not well known to the buyer. Furthermore, plaintiffs will have difficulty showing that FMC shared their information without their consent, because they have admitted that FMC's Privacy Principles stated that FMC "may share information with [other] companies if they provide a product or service that may benefit [FMC's] customers."FMC's Brief, at 14; Mem. Decision, Dkt. No. 170, at 13.Furthermore, in 21 states, plaintiffs must also establish one or more of the following elements: (1) injury; (2) the names of the class members alone have commercial value; and (3) the names were used to promote or advertise a product or service. FMC's Brief, at 12-13. As has been discussed, plaintiffs here cannot establish any of those elements.

¶18. Because the information disclosed by FMC

was a matter of public record and because plaintiffs have alleged no particular injury caused by the disclosure, plaintiffs have no reasonable prospect of recovery under any state's invasion of privacy laws.[10]

C. Federal claims under TILA and the FCRA

¶19. FMC and plaintiffs argue that consideration of any federal claims is outside of the scope of the Seventh Circuit's remand order and therefore the court should not revisit the merits of the intervenors' arguments regarding claims under TILA or the FCRA. Because these claims are easily disposed of, the court addresses them on the merits.

¶20. First, the intervenors say, "[FMC] argues that allegations based on its charging inappropriate late fees would not state a claim under TILA, but it conveniently ignores the issue of whether it violated TILA by including undisclosed telemarketing charges on its mortgage statements to customers."The late fee issue was dropped by the plaintiffs after discovery showed that it was an isolated customer service issue specific to Mr. Mirfasihi. And there are no allegations that the information-sharing class incurred undisclosed telemarketing charges on their mortgage statements; that would place them into the telemarketing class.

¶21. Second, regarding the FCRA, it is sufficient to say that the information-sharing plaintiffs cannot

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[10] Although states' laws may vary somewhat from the language of the Restatement, none have been found by the parties or the court to vary in any material way that might allow plaintiffs to recover.

recover because they did not suffer any actual damages. ***Ruffin-Thompkins v. Experian Information Solutions, Inc.,*** 422 F.3d 603, 607 (7th Cir. 2005). Therefore, neither the FCRA nor TILA are sound bases on which the information-sharing class may assert claims.

D. Other claims and issues

¶22. The intervenors suggest in one sentence that "[b]ecause [FMC] breached its own promises to the information-sharing class about the privacy of their information, Fleet's conduct gives rise to breach of contract and breach of fiduciary claims that could be certified on a national basis."Elsewhere, however, they have conceded that FMC disclosed in its Privacy Principles that it might share information about its customers with other companies. Mem. Decision, Dkt. No. 170, at 13.It is not clear what the intervenors are suggesting regarding this potential breach of contract action, but it appears to the court that a breach of contract claim would not be viable.

¶23. The intervenors have also once again raised the issues of the unfair settlement claim, a potential conflict of class counsel, and the need for new individual class notice. This court has previously rejected the unfair settlement claim and the allegation that class counsel is conflicted. Mem. Decision, Dkt. No. 170, at 14-15; 18-19; 23.These holdings are outside of the scope of the Seventh Circuit's remand and the intervenors have not raised any new facts that would warrant reconsideration of these issues. Finally, the Seventh Circuit has specifically held that individual class notice is not

required. ***Mirfasihi,*** 356 F.3d at 786.

CONCLUSION AND ORDER

¶24. For all of the foregoing reasons, the court concludes that the information-sharing plaintiffs do not have any realistic prospect of recovery under any applicable law.[11] The litigation value of their claims is minimal. On the other hand, the Settlement disgorges FMC of the profits that it made selling the plaintiffs' information and requires it to pay at least $243,000 to an organization that specializes in the education and protection of privacy rights, which is likely to provide a benefit to the members of the class. *Compare* ***Mace v. Van Ru Credit Corp.,*** 109 F.3d 338, 345 (7th Cir. 1997). Therefore, the Second Proposed Class Action Settlement [# 146] is fair, reasonable, and adequate and it is again approved. The intervenor's Second Objection [# 195] is overruled. The court incorporates by reference all other holdings of its August 11, 2005 decision.

¶25. This case is dismissed with prejudice.

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[11] Because the court has found that the information-sharing class does not have any reasonable likelihood of recovery under any applicable law, there is no need to move on to consider whether any such law would apply to the entire class and what the likelihood would be of plaintiffs winning on the merits.

OPPOSITION BRIEF

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Supreme Court, U.S.
FILED
MAY 4 - 2009
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No. 08-1221

In the
Supreme Court of the United States

ANGELA PERRY AND MICHAEL GREEN,

Petitioners,

-against-

MAV MIRFASIHI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, AND FLEET MORTGAGE CORP.,

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT FLEET MORTGAGE CORPORATION IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioners Angela Perry and Michael Green were Objectors to the settlement and Appellants below.

Respondent Mav Mirfasihi was lead-Plaintiff/Appellee below.

Respondent Fleet Mortgage Corp. was Defendant/Appellee below.

STATEMENT PURSUANT TO RULE 29.6

Respondent Fleet Mortgage Corp. was acquired by Washington Mutual Home Loans, Inc. on June 1, 2001. In connection with the acquisition, FleetBoston Financial Corp., now known as Bank of America Corp., assumed the defense of this action. Bank of America does not have any parent corporations. No publicly held company owns 10% or more of Bank of America's stock.

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INTRODUCTION

This litigation has been going on for eight years, during which Petitioners have taken three appeals challenging the fairness of a class action settlement. They now ask this Court to review an issue which the Seventh Circuit found they had forfeited because they raised it for the first time only after the case was remanded. Judge Posner further correctly characterized the issue as "frivolous," "worthless," and having "no possible merit". (Pet. App. 6-7.)

Although the issue as presented by Petitioners concerns the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), Petitioners' goal is to have the Court overturn a settlement thrice approved by a district court and ultimately affirmed by the Seventh Circuit because, in Petitioners' view, the settlement inadequately compensates certain class members who, they concede, suffered no injury. Petitioners also assert the settlement inadequately compensates their counsel. However, as the Court of Appeals recounted, Petitioners "did not propose terms of settlement or otherwise participate constructively in the litigation other than to appeal," and the district court reduced Petitioners' legal fees as a sanction for "irresponsible litigation tactics" which the Court of Appeals determined were paralleled in that "court by the many inaccurate and misleading statements in their briefs and post-argument submission." (*Id.* at 9-10.)

Had Petitioners properly preserved the FCRA issue, review by this Court still would not be warranted. The issue does not present an important federal question, and the Seventh Circuit's *dicta* addressing it is not in conflict with the decisions of other circuit courts of appeal or of this Court. And far from departing from the accepted and usual course of judicial proceedings, the courts below have, over the course of multiple appeals and remands, thoughtfully and thoroughly considered every aspect of the proposed settlement to ensure its fairness. Respondent Fleet Mortgage Corp. ("FMC" or "Fleet") therefore respectfully requests that the Court deny the Petition and allow the approved settlement to be effected to end this litigation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 551 F.3d 682. (Pet. App.) The other pertinent decisions of the United States Court of Appeals for the Seventh Circuit are reported at 450 F.3d 745, and 356 F.3d 781. The pertinent decisions of the United States District Court for the Northern District of Illinois are unreported and can be found at 2007 WL 2608778, 2007 WL 2066503, 2005 WL 1950386, 2004 WL 2609184, and 2002 U.S. Dist. LEXIS 27113.

COUNTER-STATEMENT OF THE CASE

FMC and Petitioners agree that "[t]his case has had a tortured procedural history." (Pet. 5.) Beyond that, the Petition is replete with inaccuracies, misrepresentations and distortions of the record. Respondent accordingly sets out the significant procedural history. [1]

I. Origins of the Case

In 2001 and 2002, several class action complaints were filed in federal and state courts alleging that FMC unlawfully transmitted to telemarketing firms personal information from the mortgage files of persons whose mortgages it held. (*See* Pet. App. 2.) *See also Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2005 WL 1950386, at *1 n. 1 (N.D. Ill. Aug. 11, 2005), *rev'd* 450 F.3d 745 (7th Cir. 2006) (*Mirfasihi II*). Among these was a complaint filed by Petitioners Angela Perry and Michael Green ("Petitioners") in Massachusetts state court, which asserted claims under a state consumer protection statute and other state laws,

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[1] A detailed recitation of the facts relating to the original and revised settlement agreements and the proceedings before the Seventh Circuit and the district court is set forth in *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 684-85 (7th Cir. 2008) (*Mirfasihi III*), *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 746-47 (7th Cir. 2006) (*Mirfasihi II*); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-86 (7th Cir. 2004) (*Mirfasihi I*); and *Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2005 WL 1950386, at *1-*5 (N.D. Ill. Aug. 11, 2005), *rev'd* 450 F.3d 745.

but which did not assert any claim under the Fair Credit Reporting Act. *See Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2007 WL 2608778, at *2 (N.D. Ill. Sept. 6, 2007); *see also id.* at Dkt. No. 157 (filed June 28, 2005); *Lassman v. Fleet Mortgage Corp.*, No. 01-4806, Superior Court for the Commonwealth of Massachusetts (filed Nov. 5, 2001). In 2001, after these cases were filed, FMC was sold to Washington Mutual Home Loans, Inc. and ceased to exist.[2]

Subsequently, four of the class actions were consolidated in the U.S. District Court for the Northern District of Illinois and two classes were certified for purposes of settlement: (1) an "information-sharing" class of approximately 1.4 million FMC customers who did not buy anything from telemarketers to whom FMC allegedly transmitted information; and (2) a "telemarketing" class composed of approximately 190,000 FMC customers who purchased a product from the telemarketers. (*See* Pet. App. 2-3.) *See also Mirfasihi*, 2005 WL 1950386, at *1 n. 1.[3]

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[2] Defense of this matter was assumed at that time by FleetBoston Financial Corp., now known as Bank of America Corp.

[3] Two other cases, *Minnesota v. Fleet Mortgage Corp.*, No. 01-CV-0048 (D. Minn.), and *Koluncich v. Fleet Mortgage Corp.*, No. RCV 052783 (California Sup. Ct. San Bernardino County 2001), were settled separately. *Mirfasihi*, 2005 WL 1950386, at *1 n. 1.

II. Petitioners' First and Second Appeals

In 2002, the district court, over Petitioners' untimely objections, approved an initial settlement agreement. *Mirfasihi*, 2007 WL 26068778, at *2; *Mirfasihi*, 2007 WL 2066503, at *1. Petitioners appealed, and on January 29, 2004, the Seventh Circuit reversed in part and remanded to allow the district court to estimate "the value of the legal claims of the information-sharing class." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) ("*Mirfasihi I*"). Specifically, the Seventh Circuit identified several "warning signs" for the district court to consider on remand, including: (1) "the denial of any relief to an entire class"; (2) "the reversion of unclaimed refunds to the putative wrongdoer"; (3) "the class that was denied relief did not have separate counsel from the counsel for the favored class"; and (4) "the failure of the notice of settlement to inform members of the information-sharing class" that there was a pending matter in state court in which their "rights would be extinguished, unless they opted out of" the settlement. *Id.* at 785. The court, however, reiterated that these were mere "warning signs" and did "not suggest that deletion of the reversion provision, or notice of the Massachusetts suit, or even the award of some relief for the information class, were per se requirements of an acceptable settlement." *Id.*

On remand, a new settlement was proposed that addressed certain of the concerns identified by

the Seventh Circuit, but did not provide any additional compensation to members of the information-sharing class. The district court assessed the value of the information-sharing class's claims at zero, in part, because, as Petitioners conceded, the information allegedly shared by FMC was a matter of public record, and because no member of the class had alleged actual damages. (Pet. App. 3.) *Mirfasihi*, 2005 WL 1950386, at *7-*9. Petitioners did not contend on remand that FMC's alleged conduct violated the information-sharing class's rights under FCRA. *See Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, Dkt. Nos. 113 (filed Sept. 16, 2004), 157 (filed June 28, 2005). Only after the district court approved the revised settlement, *see Mirfasihi*, 2005 WL 1950386, and Petitioners appealed, did they first assert any FCRA claims. At that time, FMC argued that Petitioners had waived their FCRA arguments by failing to assert them before the district court. *See* FMC's Resp. Br. at 18-19, Case No. 05-3669, available at http://www.ca7.uscourts.gov/briefs.htm.

On June 19, 2006, the U.S. Court of Appeals for the Seventh Circuit ordered a limited remand to allow the district court to consider a single issue: the value of the state law claims asserted on behalf of the information-sharing class. *Mirfasihi II*, 450 F.3d at 746, 751. The Seventh Circuit expressly approved all other findings by the district court. *Id.* at 749 n. 1 (stating that "the district court properly analyzed (and disposed of) the objectors' other

complaints not relating to the information-sharing class's claims evaluation and we need not address these issues here (nor need the district court revisit them upon remand)"). Although the court did not expressly discuss FCRA in its opinion, it implicitly excluded the FCRA claims from further consideration by limiting the remand to the narrow issue of state law claims. *Id.* at 751. (*See also* Pet. App. 6.)

III. Petitioners' Third Appeal

On remand, the district court asked the parties to address the potential value associated with the class members' state law claims. (Pet. App. 20.) The plaintiffs and FMC submitted comprehensive, fifty-state surveys of state consumer protection and privacy laws. (*Id.*) Petitioners did not. *Mirfasihi*, 2007 WL 2608778, at *6. "[A]fter careful and thorough review," the district court found that the surveys of state law were "accurate, comprehensive, and very helpful." (Pet. App. 24.) The district court noted also that Petitioners had not challenged the accuracy of the surveys. (*Id.*)[4] Based on this analysis, the district court held that Petitioners "do not have a viable

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[4] The district court added that plaintiffs' and FMC's "research, and not the intervenors' [Petitioners'] unsupported statements, assisted the court greatly in evaluating the plaintiffs' potential claims under each and every state's law, which was a lengthy and in the end fruitless undertaking." 2007 WL 2608778, at *6.

claim under any state's consumer protection law" or under any state privacy law. (*Id.* 24-27.)

Although the appeals court had made clear there was no need to revisit any other issue, and while acknowledging the other parties' argument that the FCRA and Truth-in-Lending Act ("TILA") claims were waived and were outside the scope of the limited remand, the district court nevertheless considered Petitioners' FCRA and TILA arguments because they were "easily disposed of." (*Id.* 27.) The court found that "neither the FCRA nor TILA are sound bases on which the information sharing class may assert claims." (*Id.* 28.) "[R]egarding the FCRA," the district court specifically added, "it is sufficient to say that the information-sharing plaintiffs cannot recover because they did not suffer any actual damages." (*Id.* 27-28.) On July 17, 2007, the district court entered an order approving the settlement and finding that Petitioners had no reasonable prospect of recovery under any applicable law. (*Id.* 12-29.)

In a subsequent order, the district court awarded Petitioners $18,750 in attorneys' fees. *Mirfasihi*, 2007 WL 2608778. In setting the fee award, the court noted that Petitioners had "burdened the court at least as much as they [had] helped it." *Id.* at *6. "[W]hile the intervenors [Petitioners] correctly identified some troublesome elements of the settlement," the court observed, "they did not meaningfully assist the court in analyzing those issues." *Id.* at *7. The fee amount

reflected the court's decision to award Petitioners' counsel fees totaling 5% of the fees awarded to class counsel, with the "modification" that the amount be reduced by one-half (or 2.5% of the fee awarded to class counsel) "to account for the burden that the objectors have placed on all parties involved." *Id.* Petitioners appealed both orders to the Seventh Circuit.

In affirming the district court's approval of the revised settlement, the Seventh Circuit held that Petitioners' FCRA claims were not properly before the court. (Pet. App. 5-6.) The Seventh Circuit found that "although [FCRA] was mentioned in the complaint, [Petitioners] first sought to apply it to the information-sharing class after our first remand. That was too late." (Pet. App. 5 (citing *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002) (a party "'cannot use the accident of remand as an opportunity to reopen waived issues'").) The court added that although it "did not discuss [FCRA] in [*Mirfasihi II*], [it] implicitly excluded [FCRA] from further consideration by stating that 'on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law.'" (*Id.* 6 (emphasis in original).)

Thus, the appeals court stated, the district court "should not have wasted [its] time on the issue." (*Id.*) "[B]esides having been forfeited," Judge Posner stated, "the claim that Fleet violated the Fair Credit Reporting Act has no possible merit,

and in fact is frivolous." (*Id.*) In *dicta*, the Seventh Circuit added that FMC was not a consumer reporting agency under FCRA, 15 U.S.C. § 1681a(f), because FMC did not "'regularly engage[] in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.'" (*Id.* 6-7 (quoting § 1681a(f)).) In so stating, the Seventh Circuit recognized that FMC "'merely passe[d] along information concerning particular debts owed to it'" and is therefore not a consumer reporting agency. (*Id.* 7 (quoting *DiGianni v. Stern's*, 26 F.3d 346, 349 (2d Cir. 1994)).) The court added that FMC sold "'information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report [Fleet].'" (*Id.* (citing *DiGianni*, 26 F.3d at 349; *Smith v. First Nat'l Bank*, 837 F.2d 1575, 1578 (11th Cir. 1988) (per curiam)).)

The Seventh Circuit stated also that there was "no evidence that any members of the information-sharing class suffered any harm from Fleet's disclosing information about them to telemarketers." (*Id.* 4.) The court concluded that "the claims of the information-sharing class are indeed worthless[.]" (*Id.* 7.)[5]

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[5] Thus, Petitioners failed to substantiate any claim of any value before any court, notwithstanding that they have astronomically increased the asserted value of those claims at each step of the litigation, including before this Court. *Compare Mirfasihi*, 2007 WL 2608778, at *3 (recognizing that *(cont'd)*

The Seventh Circuit decried Petitioners' "chutzpah" in requesting that the entirety of the attorneys' fees awarded to class counsel ($750,000) be transferred to Petitioners' counsel, referring to the request as "preposterous." (*Id.* 9.) After recognizing that Petitioners' "twice prevailed on appeal," the court stated:

> As important to a proper evaluation of the objectors' contribution as the meagerness of the relief that they obtained by extending the litigation by several years is their lack of constructive activity in the district court. They did not propose terms of settlement or otherwise participate constructively in the litigation other than to appeal.

(*Id.* 9-10.) The court concluded:

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in *Mirfasihi I* (2004), the Seventh Circuit discussed Petitioners' argument that "the information-sharing class could expect . . . total damages of . . . $35 million"), *with Mirfasihi*, 2005 WL 1950386, at *6 (recognizing that as of 2005, Petitioners asserted that they "have additional claims against FMC and FleetBoston . . . that would entitle members of the information-sharing class to at least a doubling but no more than a trebling of their damages, potentially amounting to damages in the amount of $105 million"); (Pet. App. 4) (recognizing that in 2008, Petitioners alleged that their "claims have value (perhaps in excess of a billion dollars!)"); *and* (Pet. 19, 28) (asserting before this Court that the FCRA claim could be worth $140 million to $1.6 billion).

> The success obtained by the objectors was meager, as we have said, and the cost incurred-unknown. The fee applications that they submitted to the district court were barren of the detail required for an assessment of that cost. Moreover, the district judge initially determined their fee to be $37,500, and only later cut it in half as a sanction for their irresponsible litigation tactics (paralleled in this court by the many inaccurate and misleading statements in their briefs and post-argument submission) that exasperated a very patient district judge.
>
> * * *
>
> The improvement that the objectors produced in this case, minus the detriment caused by their courtroom antics, barely justified the modest fee that the judge awarded them.

(*Id.* 10-11.)

REASONS FOR DENYING THE WRIT

Petitioners raise an issue that has been waived, and in any event fail to present any compelling reason for this Court to grant a writ of certiorari because (1) Petitioners have failed to

identify any split among the circuit courts of appeal regarding the application of FCRA; and (2) the root of Petitioners' claim involves the circuit court's assessment of whether the district court abused its discretion in determining that a settlement is fair. Petitioners' rehashing of properly rejected legal theories and waived arguments therefore offers no basis to grant certiorari, and the Petition should be denied.

I. Petitioners Forfeited Any FCRA Claim

The crux of Petitioners' request for certiorari is the refusal of the courts below to place any value on their belatedly-raised FCRA arguments. Yet, as the Seventh Circuit correctly recognized, Petitioners did not seek to apply FCRA to their claims until it was "too late": after the Seventh Circuit's initial remand in 2004. (Pet. App. 5 (citing *Husband*, 312 F.3d at 251).)

As the Seventh Circuit held, Petitioners' FCRA arguments were not properly before it. Accordingly, Petitioners' question cannot be the subject of certiorari review in this Court. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n. 4, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (recognizing that an argument not raised below is waived); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 895, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (refusing to consider an issue that had been raised for the first time in the reply brief filed in the court of appeals). *See also Husband*, 312 F.3d at 250 ("any issue that could have been but was not

raised on appeal is waived and thus not remanded"); *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (same); *Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.").

II. Petitioners Offer No Compelling Reason To Grant Certiorari

Even if Petitioners had not waived their FCRA claim, the issue does not warrant review by this Court.

A. Petitioners Do Not Raise an Important Federal Question or Identify a Split Among the Circuit Courts Regarding the Question Presented

The Seventh Circuit's *dicta* concerning FCRA conflicts with neither the decision of any other court of appeals nor with any Supreme Court decision. In fact, as Respondents have maintained (and as the Seventh Circuit found, *see* Pet. App. 6-7), regardless of how broad the overarching purpose of FCRA, FCRA by its terms does not apply to FMC.

First, notwithstanding their assertion that "every court to consider the issue has disagreed with the Seventh Circuit" (Pet. 7), Petitioners do not identify a single case which held that a

mortgage company such as FMC is a consumer reporting agency under FCRA. Instead, they cite inapposite cases, none of which concerns mortgage companies, and most of which hold that the entity at issue, like FMC, was not a consumer reporting agency for purposes of the Act. (*See* Pet. 8-9.) At the same time, cases are legion holding that banks and other financial institutions are not consumer reporting agencies within the meaning of FCRA. *See, e.g.*, *Frederick v. Marquette Nat'l Bank*, 911 F.2d 1, 2 (7th Cir. 1990) (finding that Marquette National Bank is not a consumer reporting agency); *Friend v. Ancillia Systems Inc.*, 68 F. Supp. 2d 969, 974 (N.D. Ill. 1999) (holding that a financial institution that does no more than give information to a third party is not acting as a consumer reporting agency); *Batchelor v. First Nat'l Bank*, No. 92 C 5073, 1993 WL 22859, *3 (N.D. Ill. Jan. 20, 1993) ("Since defendant's alleged wrongdoing is as a provider of information about a consumer transaction in which it was involved, defendant cannot be liable under the Fair Credit Reporting Act."). *See also DiGianni*, 26 F.3d at 349 ("The FCRA does not impose obligations upon a creditor who merely passes along information concerning particular debts owed to it."); *Oldroyd v. Assocs. Consumer Disc. Co./PA*, 863 F. Supp. 237, 241 (E.D. Pa. 1994) (holding that FCRA is not applicable to a mortgage company that is not regularly engaged in assembling credit information for the purpose of furnishing consumer reports to third parties).

FCRA, moreover, contains an exemption from the definition of "consumer reports" for information relayed that concerns only an entity's transactions and experiences with its customers. *See* 15 U.S.C. § 1681a(d)(2)(A)(i) (stating that "the term 'consumer report' does not include ... [a] report containing information solely as to transactions or experiences between the consumer and the person making the report"). Although Petitioners contend that "every court to consider the issue has disagreed with the Seventh Circuit on the scope of the §1681a(d)(2)(A)(i) exemption" (*see* Pet. 10-12), they identify nothing in the record to establish that the information allegedly transmitted by FMC to telemarketers included anything other than "information solely as to transactions or experiences between the consumer and the person making the report." 15 U.S.C. § 1681a(d)(2)(A)(i).

FMC was alleged to have provided telemarketers with information from customers' mortgage files (such as loan amounts and telephone numbers) (*see Lassman v. Fleet Mortgage Corp.*, No. 01-4806, Superior Court for the Commonwealth of Massachusetts (filed Nov. 5, 2001), at ¶10), information which, as Petitioners conceded below, was publicly available. *Mirfasihi*, 2005 WL 1950386, at *7. As the Seventh Circuit correctly recognized, this alleged conduct falls within the exemption. (Pet. App. 7 (stating that "[w]hat Fleet sold the telemarketers was 'information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report

[Fleet]'".) Petitioner's belated claim that FMC "violated FCRA more than one million times" (Pet. 13) thus "has no possible merit, and in fact is frivolous," as the Seventh Circuit properly concluded. (Pet. App. 6.) *See also DiGianni*, 26 F.3d at 349 (recognizing that FCRA excludes "from the statutory definition of consumer report" any "reports 'containing information solely as to transactions or experiences between the consumer and the person making the report'"); *Smith*, 837 F.2d at 1578 (stating that "where the Bank has reported information based solely on its own experience with one of its customers, the Bank is not acting as a 'consumer reporting agency,' within the meaning of the Fair Credit Reporting Act"); *Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1096 (5th Cir. 1992) ("The 'transactions and experiences' provision exempts from coverage any report based on the reporter's first-hand experience of the subject."); *Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985) (information "based solely on [defendant's] own credit records of store transaction[s] ... cannot constitute a 'consumer report' under the FCRA"); *Friend*, 68 F. Supp. 2d at 974 (finding that "[a] report containing information solely as to transactions or experiences between the consumer and the person making the report is specifically excluded from the term 'consumer report'").

B. The Seventh Circuit's Decision Did Not Stray from the Accepted and Usual Course of Judicial Proceedings

Most issues arising under Federal Rule 23 are committed in the first instance to the discretion of the district court. *Califano v. Yamasaki*, 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). A district court's approval of a class action settlement is no exception. *See, e.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 741-43, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) (applying the abuse of discretion standard of review in upholding a district court's fee waiver in a class action settlement); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (recognizing that the Seventh Circuit's review of a district court's approval of a class action settlement is limited to whether the court abused its discretion).

Here, the Seventh Circuit thoroughly assessed the district court's exercise of that discretion three times, and on two occasions sent the proposed settlement back to the district court for more work. In the order which Petitioners would have this Court review, the Seventh Circuit correctly determined that the district court had thoroughly reviewed the one outstanding issue identified in *Mirfasihi II* – an estimation of the value of Petitioners' state law claims. The Petition does not challenge the determination by the district court, affirmed by the court of appeals, that their state law claims had no value.

Petitioners, moreover, do not assert that either the district court or the Seventh Circuit improperly stated the controlling law as to any issue. [6] To the contrary, the Seventh Circuit properly stated the controlling law, carefully analyzed the district court's judgment (with the benefit of having twice considered the settlement), and thoughtfully affirmed the district court's decision. The Seventh Circuit's decision can in no way be said to depart from the standard course of judicial proceedings, let alone stray so far from the standard as to warrant this Court's attention.

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[6] In this regard, Petitioners' belated attempt to assert that the Seventh Circuit failed to follow *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), is unavailing. First, never in any of the numerous proceedings below did Petitioners raise *Amchem* or contend that certification of the class for purposes of settlement was improper. Second, Petitioners do not contend before this Court that the Seventh Circuit erred in approving the district court's certification of the class for settlement purposes, which was the issue addressed in *Amchem*.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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Supreme Court of the United States

ANGELA PERRY and MICHAEL GREEN,
Petitioners,

v.

MAV MIRFASIHI, on behalf of himself and all others similarly situated, and FLEET MORTGAGE CORP.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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INTRODUCTION

Plaintiff-respondent Mav Mirfasihi, on behalf of himself and all others similarly situated, respectfully submits that this Court should deny the petition of Angela Perry and Michael Green, objectors to a class action settlement.

After thorough scrutiny, the district court approved a revised class action settlement. On appeal, the Seventh Circuit remanded for additional scrutiny on one limited issue. The district court followed the Seventh Circuit's instructions, scrutinized the issue that the Seventh Circuit had identified, and re-approved the revised settlement. The objectors then appealed the approval again. On appeal, the Seventh Circuit affirmed the trial court's second approval of the revised settlement. The objectors now petition for a writ of certiorari, arguing that the Seventh Circuit erred with respect to plaintiff's claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA").

The petitioners make two principal errors, either of which is dispositive without this Court's intervention.

First, the Seventh Circuit ruled that the objectors *waived* their FCRA objection by not raising it in the district court before appealing the first approval of the revised settlement. Only secondarily, in dictum, did the Seventh Circuit

address the merits of the petitioners' FCRA objection. Yet the petitioners identify only a single question for review: whether the Seventh Circuit's alternative language with respect to the merits of the FCRA claims was correct. As a result, even if this Court were to reverse on the sole question presented, it would not change the result.

Second, the petitioners repeatedly contend that respondent Fleet Mortgage Corporation furnished information to telemarketers "based on sources other than its own experience," Pet. 1; "not based solely on Fleet Mortgage's relationship with the customer," Pet. 4; and "obtained from sources other than its own experience," Pet 7. Nothing in the record supports these assertions, which provide the entire basis for petitioners' FCRA objection that the settlement should not have been approved.

This is an unremarkable case with no important issues to decide. It involves a class-action settlement that received intense and repeated scrutiny and supervision by the trial court and the Court of Appeals. Petitioners try to make their FCRA argument *seem* important by distorting the factual record and case history, and by failing to highlight that the Seventh Circuit decided first and foremost that petitioners waived their objection based on the FCRA many years ago. The petition should be denied.

OPINIONS BELOW

The reported opinions of the United States Court of Appeals for the Seventh Circuit are at 551 F.3d 682 (7th Cir. 2008) (affirming second approval of revised settlement); 450 F.3d 745 (7th Cir. 2006) (remanding first approval of revised settlement for further consideration of limited issue of state law); and 356 F.3d 781 (7th Cir. 2004) (reversing approval of original settlement).

The reported opinions of the United States District Court for the Northern District of Illinois are at 2007 U.S. Dist. Lexis 65906 (N.D. Ill. 2007) (awarding fees to the petitioners and reducing the award "by half to account for the burden that the objectors have placed on all parties involved"); 2007 U.S. Dist. Lexis 51474 (N.D. Ill. 2007) (approving revised settlement for second time); and 2005 U.S. Dist. Lexis 16701 (N.D. Ill. 2005) (approving revised settlement for first time, later "incorporate[d] by reference" into the district court's second approval at 2007 U.S. Dist. Lexis 51474 (N.D. Ill. 2007)).

Earlier reported opinions of the district court that are less relevant to this petition are at 2004 U.S. Dist. Lexis 23460 (N.D. Ill. 2004) (allowing petitioners to intervene) and 2002 U.S. Dist. Lexis 27113 (N.D. Ill. 2002) (approving original settlement).

STATEMENT OF THE CASE

In this matter, two objectors seek re-review of a class action settlement that has already received intense scrutiny and supervision multiple times by the district court and Seventh Circuit. The settlement itself (the "revised" settlement) is the result of a renegotiation of an earlier settlement (the "original" settlement") that also received intense scrutiny by the Seventh Circuit and was overturned. When the parties agreed to the revised settlement and the district court approved it twice, they had the benefit of detailed guidance from the Seventh Circuit, which they rigorously followed to the Seventh Circuit's satisfaction.

The case involves a mortgage company, Fleet Mortgage Corporation, that ceased its existence in June 2001. Plaintiff alleges that, prior to that time, Fleet improperly sold the names and mortgage account numbers of its mortgage customers to several telemarketers for an amount that plaintiff later determined to be $243,000. Plaintiff alleges that Fleet then participated with those telemarketers in deceptive telemarketing practices that resulted in unauthorized charges being assessed on some customers' mortgage statements.

I. The Original Settlement

After several rounds of motions to dismiss, the parties decided to enter into settlement discussions,

exchanged relevant documents and information, and ultimately entered into the original settlement agreement. On July 31, 2002, they filed it with the district court. The agreement, by its terms, included the disposition of three similar cases that were pending in state courts in Minnesota, Maryland, and Wisconsin.

The original settlement involved two classes: an "information-sharing" class comprised of about 1.4 million members whose names Fleet had provided to the telemarketers; and a "telemarketing" class, comprised of about 190,000 members who were billed for telemarketed products or services. The telemarketing class is a subset of the information-sharing class.

Based on an evaluation that the claims of the information-sharing class were subject to a number of difficult factual and legal hurdles, the original settlement of these claims provided for full disgorgement of all of the revenue ($243,000) that Fleet had received for sharing its information with telemarketers. As a practical matter, no direct payment could be made directly to the members of the information-sharing class because the total amount to be disgorged would have amounted to less than 20¢ per person if divided among class members.

The original settlement of the claims of the telemarketing class involved a claims procedure

whereby claimants could obtain certain levels of relief up to a total of $2.4 million for this class.

Over the petitioners' objections, the district court approved the original settlement. The petitioners appealed. The Seventh Circuit reversed, listing a number of specific factors that the parties and the district court needed to take into account, analyze, and articulate before the settlement could be approved. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004) ("*Mirfasihi I*"). Among other points, the Seventh Circuit indicated a preference for having separate counsel represent the information-sharing and telemarketing classes. *Id.* at 785.

II. The Revised Settlement

Following remand, the would-be class representatives of the telemarketing class brought in new counsel that had not participated in the original settlement. Thereafter, the previous counsel devoted their attention solely to the information-sharing claims.

The parties then evaluated whether to continue litigating or first attempt to negotiate a different settlement. They elected the latter course. After face-to-face negotiations, the efforts of a settlement judge, and finally mediation before a retired judge, the parties agreed to a revised

settlement, which on May 31, 2005 they presented to the district court for approval.

The revised settlement involved re-certification of the same two classes as the original settlement: an information-sharing class and a telemarketing class. The relief, however, was different. Under the revised settlement, as under the original settlement, the consideration for settling the information-sharing claims was Fleet's disgorgement of the full amount, $243,000, that Fleet received for sharing the names of its mortgagors. But unlike the original settlement, the funds that Fleet disgorged would not be used to pay the telemarketing claims. Also, there would be no reversion to Fleet of unclaimed settlement funds, which instead would be paid to a non-profit organization devoted to protecting privacy rights.

A. The District Court's First Approval of the Revised Settlement

The parties filed thorough and detailed briefs, declarations, and evidence in the district court in support of the revised settlement. These filings analyzed and addressed each of the concerns that the Seventh Circuit expressed in *Mirfasihi I*.

On June 28, 2005, the petitioners filed multiple objections to the revised settlement. Some of their objections were the same ones that the Seventh Circuit previously rejected in *Mirfasihi I*.

Mirfasihi v. Fleet Mortgage Corp., 2005 U.S. Dist. Lexis 16701, *27 (N.D. Ill. 2005) ("Green and Perry previously raised these objections[;] [t]he Seventh Circuit sustained some ... while rejecting others").

One of the petitioners' principal objections was that Fleet's conduct, as it related to obtaining approval of the original settlement, somehow created a claim for "unfair settlement practices" that were purportedly actionable under Massachusetts consumer protection law. *See* Mass. Gen. L. ch. 93A. The petitioners contended that not only was Fleet's conduct in settling the case actionable but, under Massachusetts law, every one of the 1.4 million members of the proposed information-sharing class was entitled to between $25 and $75 in statutory damages without proof of any harm whatsoever because Fleet had entered into a settlement that had been disapproved on appeal. The petitioners argued that, under their novel theory, their "unfair-settlement-practices" claim was worth up to $105 million to the information-sharing class and therefore the settlement consideration was inadequate. None of the petitioners' objections to the revised settlement in the district court mentioned plaintiffs' FCRA claim or any purported problems with settling that claim based on the consideration provided by the settlement.

All parties, including the petitioners, then briefed each and every one of the petitioners' objections.

On August 11, 2005, the district court issued a 25-page memorandum decision re-certifying the settlement classes, rejecting the petitioners' objections on their merits, and approving the settlement. *Mirfasihi v. Fleet Mortgage Corp.*, 2005 U.S. Dist. Lexis 16701 (N.D. Ill. 2005). After a thorough analysis, the district court ruled that "the claims of the information-sharing class are worth a minimal amount ... In light of the weakness of the information-sharing class's case on its merits, the payment of $243,000 to the Electronic Privacy Information Center is a fair and reasonable settlement of the information-sharing class's claims ... [and] is likely to benefit members of the class in helping to protect their privacy interests." *Id.* at **29-30.

B. The Petitioners' Appeal of the District Court's First Approval of the Revised Settlement

The petitioners appealed virtually every aspect of the district court's approval of the revised settlement, and re-argued numerous objections that the Seventh Circuit had already ruled against in *Mirfasihi I*.

In their appellate briefing, the petitioners cursorily mentioned, for the very first time, an issue concerning the district court's valuation of the information-sharing class's claims under the FCRA.

The petitioners had never raised this issue in the district court.

In the appeal, plaintiff and Fleet had two responses: First, the petitioners had waived their objections concerning settlement of the FCRA claim by not raising them below; and second, the petitioners' FCRA arguments were wrong on their merits. At oral argument, the parties expressly debated the merits of the petitioners' newly raised arguments concerning settlement of plaintiff's FCRA claims.

The Seventh Circuit reversed the district court's approval of the revised settlement. The reversal was not due to any particular problem with the revised settlement but instead related to the Seventh Circuit's view that the district court's analysis had been incomplete in one respect: The district court, in the portion of its 2005 memorandum decision analyzing state consumer protection laws, indicated that it had sampled only four states. (The parties had given the court information on all relevant states' consumer protection laws, but the Seventh Circuit wanted to make sure the district court had analyzed it.) Thus, the Seventh Circuit determined that the district court should perform a more complete analysis of applicable state law. *See Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 751 (7th Cir. 2006) ("*Mirfasihi II*"). The Seventh Circuit held:

> [O]n remand, the district court should consider and analyze the full cross-section of potentially applicable **state** law and arrive at a clearer estimate of the potential value of the information-sharing class's claims to allow proper evaluation of the reasonableness of the proposed settlement.

Id. (emphasis added).

In *Mirfasihi II*, the Seventh Circuit noted the FCRA objection, *id.* at 746, but did not write about it separately, accepting the parties' waiver argument and/or merits argument when it rejected all of the petitioners' other complaints. After analyzing certain objections in detail, the Seventh Circuit summarily rejected all of the other objections to the settlement:

> Indeed, the district court properly analyzed (and disposed of) the objectors' other complaints not relating to the information-sharing class's claims evaluation and we need not address these issues here (nor need the district court revisit them upon remand).

Id. at 749 n.1.

C. The District Court's Second Approval of the Revised Settlement

On remand, the district court asked for additional briefing on the sole issue that had been remanded for further consideration. Plaintiff and Fleet each submitted a thorough and comprehensive analysis of all potentially applicable state law as the Seventh Circuit instructed. They each accompanied their briefing with lengthy but easy-to-understand charts citing and quoting applicable state statutes and case law.

The petitioners, on the other hand, submitted a brand new set of objections, uninvited by the district court, "most of which are the same as arguments that they have raised at least once before."[1] *Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. Lexis 51474, *10 (N.D. Ill. 2007); Pet. App. 18-19. For the first time in the district court,

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[1] In a separate decision on the objectors' fees, the district court observed: "They did not provide the court with any additional legal support or analysis for their assertions, however. Instead, in their third set of objections, they apparently lifted text from their second set of objections (their first objections to the second settlement)." *Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. Lexis 65906, *17 (N.D. Ill. 2007). The objectors asked for an award of fees and expenses of $750,000, which was the full amount that the settlement made available for all fees and expenses, but the district court awarded objectors only $18,750, stating in part, "Unfortunately, the court is constrained to conclude that after raising their initial objections and pursuing their first appeal in 2002, ... the intervenors have burdened the court at least as much as they have helped it." *Id.* at **16-17.

the petitioners argued (in a cursory manner) that the FCRA claims were undervalued.

In response, Plaintiff and Fleet argued that the petitioners had long ago waived their FCRA objections by not raising them in the district court prior to *Mirfasihi II*, and that the petitioners were, in any event, wrong on the merits. Plaintiff and Fleet also argued the petitioners' FCRA arguments were outside the scope of the Seventh Circuit's limited remand order.

On July 17, 2007, the district court issued a 14-page memorandum decision approving the revised settlement for a second time. *Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. Lexis 51474 (N.D. Ill. 2007); Pet. App. 12-29. The district court observed: "The intervenors do not challenge the accuracy of the parties' surveys and after careful and thorough review, the court finds them to be accurate, comprehensive, and very helpful and commends FMC and the plaintiffs for their work." Pet. App. 24.

After considering and analyzing the full cross-section of potentially applicable state law, as the Seventh Circuit had directed, the district court determined that the potential value of the information-sharing class's claims was minimal. Pet. App. 29 ("[t]he litigation value of their claims is minimal").

With respect to the petitioners' FCRA objection, which they presented only briefly for the first time in the district court, the district court acknowledged that it did not need to address the objection but did so anyway, overruling it and approving the settlement. The district court incorporated by reference all other holdings of its 25-page 2005 memorandum decision into its 14-page 2007 memorandum decision. Pet. App. 29.

D. The Petitioners' Appeal of the District Court's Second Approval of the Revised Settlement

Apparently disappointed by the amount of fees they were awarded, *see supra* at 12 n.1, the petitioners appealed yet again, asking the Seventh Circuit to review once again the district court's approval of the revised settlement (the petitioners' third appeal).

This time, the petitioners made their FCRA objection central to their appeal. They contended that the district court had made an error in stating that recovery of statutory damages under the FCRA requires actual damages — a brief comment by the district court that none of the parties had suggested and which went beyond the parties' briefing on the FCRA. The petitioners also tried to re-argue most of the other objections they had raised before on appeal, which the Seventh Circuit had already considered and rejected.

On December 30, 2008, in its third detailed opinion on the settlement of this case, the Seventh Circuit affirmed the district court's approval of the revised settlement. *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682 (7th Cir. 2008) ("*Mirfasihi III*"). *See* Pet. App. 1.

With respect to the petitioners' FCRA argument — which is the only question presented for review in this Court — the Seventh Circuit held as follows: The petitioners had waived this issue long ago, and a party "cannot use the accident of remand as an opportunity to reopen waived issues ..." Pet. App. 5-6 (quoting *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002), *cert. denied*, 539 U.S. 961 (2003)). The Seventh Circuit elaborated on this point:

> We did not discuss the Act in our second opinion, but implicitly excluded it from further consideration by stating that "on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law." ...
>
> On remand, the district judge nevertheless discussed (and rejected) the applicability of the Act to the class. She should not have wasted her time on the issue. The objectors argue that the scope of the remand was ambiguous; it

> was not; but if the objectors thought it was, or, more plausibly, wanted us to reconsider the scope of the remand, they should have petitioned us for clarification or reconsideration, and they did not.

Pet. App. 6 (emphasis in the original; citations omitted).

The Seventh Circuit went on to give alternative observations, which the Seventh Circuit made clear were in dictum: "**[B]esides** having been forfeited, the claim that Fleet violated the Fair Credit Reporting Act has no possible merit ..." Pet. App. 6.

As for this dictum — i.e., the merits of the FCRA objection — the Seventh Circuit gave two reasons, either of which would have been dispositive.

First, "Fleet ... is not a consumer reporting agency — it is a bank. ... 'The [FCRA] does not impose obligations upon a creditor who merely passes along information concerning particular debts owed to it.'" Pet. App. 7 (quoting *DiGianni v. Stern's*, 26 F.3d 346, 349 (2d Cir.), *cert. denied*, 513 U.S. 897 (1994)).

Second, "What Fleet sold the telemarketers was 'information solely as to transactions between the consumer [the Fleet mortgagor] and the person

making the report [Fleet]," which is excluded from the statutory definition of "consumer reports." Pet. App. 7 (brackets in the original; original ellipsis omitted) (quoting *DiGianni*, 26 F.3d at 349).

The Seventh Circuit ended its third opinion by stating: "This case is *finito*. Affirmed." Pet. App. 11.

E. The Petitioners' Misstatements of the Record

In an effort to get this Court's attention, Petitioners have misrepresented the record in at least the following important respects:

One, petitioners contend that Fleet sold "nonpublic" information to the telemarketers. Pet. 4. Nothing in the record supports this assertion; and the district court expressly held that "the intervenors concede that the information that FMC disclosed about the plaintiffs was already a matter of public record." Pet. App. 21.

Two, petitioners contend that Fleet provided telemarketing firms with specific information including "current loan balances, monthly payments, loan origination dates and loan maturity dates." Pet. 4. There is no support for this assertion in the record.

Three, petitioners contend that Fleet provided to the telemarketers information "that was not based solely on Fleet Mortgage's relationship with the customer." Pet. 4. Similarly, petitioners contend that what Fleet provided "included information about Fleet Mortgage's customers obtained from sources other than its own experience ..." Pet. 7. Petitioners repeat similar assertions in their introduction and throughout their petition as reasons for granting a writ. For example, they contend Fleet "was selling 'consumer reports' within the meaning of the FCRA because those reports contained credit information pre-existing that customer's relationship with Fleet Mortgage ..." Pet. 15. This is a fundamental point in their petition, yet there is absolutely no support for these assertions in the record.

Four, petitioners contend that Fleet provided the telemarketers with a "prescreened list." *E.g.*, Pet. 4, 15. Once again, there is no support for this in the record.

REASONS FOR DENYING THE PETITION

I. The Petitioners Waived Their FCRA Objection by Not Timely Raising it in the District Court

The petitioners waived their FCRA objection and arguments by not timely raising them in the district court before appealing to the Seventh Circuit

the second time. Appellate courts generally review only those issues timely presented to the lower court, and this Court has long recognized and upheld the concept of waiver: "Ordinarily an appellate court does not give consideration to issues not raised below." *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("[b]ecause this argument was not raised below, it is waived").

As a corollary, an objector to a class-action settlement "will only be allowed to appeal that aspect of the District Court's order that affects him — the District Court's decision to disregard his objections." *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). As a result, because the petitioners first raised their FCRA objection and arguments in their appellate briefs in the *Mirfasihi II* appeal (and did so only in a cursory fashion) and had not previously raised this objection in the district court, the Seventh Circuit properly determined that this objection had been waived.

In particular, on May 31, 2005, plaintiff and Fleet filed their revised settlement with the district court. On June 28, 2005, the petitioners filed a multitude of objections. All parties then briefed each and every one of those objections in detail — including three separate briefs from the petitioners detailing all of their objections to the settlement. The petitioners made no objection concerning

settlement of the FCRA claims. As a result, the district court's opinion approving the revised settlement for the first time did not address the FCRA.

Petitioners first raised their FCRA objection in their appellate briefing in the *Mirfasihi II* appeal and, even then, devoted only two sentences to this objection. In their opposition briefs in the *Mirfasihi II* appeal, plaintiff and defendant each argued that, first, the petitioners had waived their FCRA objection by failing to raise it in the district court; and second, the value of the FCRA claim was minimal in any event. The petitioners and the other parties each discussed the FCRA objection briefly during oral argument in the *Mirfasihi II* appeal.

In *Mirasihi II*, the Seventh Circuit rejected the district court's approval of the revised settlement, but only on a narrow basis: The Seventh Circuit considered it appropriate for the district court to conduct a more thorough examination of applicable state law from all relevant states instead of sampling and discussing just a few states. The Seventh Circuit disposed of all objections that had been raised by the petitioners and remanded the settlement for a final analysis on this one issue. The effect of this decision was to confirm that the petitioners had waived their FCRA objections.

Subsequently, in the *Mirfasihi III* appeal, the petitioners once again tried to raise their FCRA

objection and arguments. Again plaintiff and Fleet each opposed it based on that the petitioners had previously waived this argument and also it was wrong on the merits.

In *Mirfasihi III*, the Seventh Circuit specifically addressed petitioners' FCRA objection as follows: "We did not discuss the Act in our second opinion, but implicitly excluded it from further consideration by stating that 'on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law.'" *Mirfasihi III*, Pet. App. 6 (emphasis in the original). *See United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002), *cert. denied*, 539 U.S. 961 (2003) (a party "'cannot 'use the accident of remand as an opportunity to reopen waived issues'"), *quoted in Mirfasihi III*, Pet. App. 5-6; *accord*, *United States v. Radmall*, 340 F.3d 798, 802 (9th Cir. 2003) (same quote).

In addition, during oral argument in the *Mirfasihi III* appeal, the petitioners specifically asked the Seventh Circuit panel for a post-argument opportunity to show that they had raised their FCRA argument in the district court prior to *Mirfasihi II*. The Seventh Circuit granted them that additional opportunity and the petitioners submitted an additional brief, but their post-argument submission was inaccurate and misleading. The Seventh Circuit, in its *Mirfasihi III* opinion, commented with disfavor on the petitioners' "irresponsible litigation

tactics" including their "inaccurate and misleading statements in their ... post-argument submission ..." Pet. App. 10.

The Seventh Circuit has treated the petitioners more than fairly. There is nothing remarkable about the Seventh Circuit's decision to reject the petitioners' untimely FCRA objection and arguments and uphold the trial court's second approval of the revised settlement. There is no split of authority among the circuits concerning this issue. The petition should be denied.

II. Fleet Did Not Transmit Consumer Reports because It Reported Information Solely as To Its Own Transactions

Not only did the petitioners waive the sole issue on which they seek review in this Court, but the FCRA does not even apply to the facts of this case. The facts are that Fleet communicated only information as to its transactions or experiences between consumers and itself, which is expressly excluded from the FCRA's definition of a "consumer report." Nothing in the record supports the factual predicate for petitioners' FCRA argument.

In this case, unless Fleet conveyed "consumer reports," it cannot be liable under the FCRA. *E.g.*, *Ippolito v. WNS, Inc.*, 864 F.2d 440, 448 (7th Cir. 1988), *cert. dismissed*, 490 U.S. 1061 (1989) ("if the Special Service Reports are not 'consumer reports,'

then the FCRA does not cover any of WNS's actions"); *see also Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149 (3rd Cir. 1986) ("[t]he statute requires one to divulge the report upon request only if the report qualifies as a 'consumer report' as defined by the statute").

The relevant portion of the definition of "consumer report" in the FCRA reads as follows:

> Exclusions. ... [T]he term "consumer report" does not include —
>
> (A) ... any —
>
> (i) ... information solely as to transactions or experiences between the consumer and the person making the report.

15 U.S.C. § 1681a(d)(2).

This exclusion means exactly what is says. For example:

> The "transactions and experiences" provision exempts from coverage any report based on the reporter's first-hand experience of the subject. Therefore, a retailing firm's disclosure of its own ledger experience with a customer or a bank's report of its own experience with its customers would not constitute a consumer report.

Hodge v. Texaco, Inc., 975 F.2d 1093, 1096 (5th Cir. 1992) (citations omitted). *Accord, Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985) ("[t]he information that Macy's provided to CBI was ... based solely on its own credit records of store transaction; thus, it cannot constitute a 'consumer report' under the FCRA").

Similarly, in a case where a "[b]ank had reported that Smith was delinquent in her Visa account," the court held:

> [T]he Bank is not acting as a "consumer reporting agency," within the meaning of the Fair Credit Reporting Act, because, *inter alia*, it has not furnished a "consumer report" as that term is defined in the Act. A "consumer report" does not include "any report containing information solely as to transactions or experiences between the consumer and the person making the report."

Smith v. First Nat'l Bank, 837 F.2d 1575, 1577, 1578 (11th Cir.) (per curiam), *cert. denied*, 488 U.S. 821 (1988).[2]

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[2] *Accord, Showalter v. Chase Manhattan/Providian*, 2005 U.S. Dist. Lexis 45465, *8 (N.D. Cal. 2005) (in a case involving credit cards, "[p]laintiffs allege only that Chase and MBNA reported to third parties information regarding transactions between defendants and plaintiff[;] [d]efendants did not, therefore, furnish a consumer report regarding plaintiff"); *Brown v. Chrysler Fin. Servs.*, 2004 U.S. Dist. Lexis 19390, *2, *12 (N.D. Ill. 2004) (dismissing

Applying this "transactions and experiences" exclusion to Fleet, there is nothing in the record that supports that Fleet transmitted anything other than its mortgagors' names, addresses, mortgage account numbers, and the like. All of this information comes directly from Fleet's own mortgage "transactions and experiences" with its customers. Therefore, the information that Fleet transmitted falls squarely within the exclusion in the statutory definition of consumer reports. As a result, the FCRA does not apply.

This is exactly what the Seventh Circuit observed in dictum in *Mirfasihi III*: "What Fleet sold the telemarketers was 'information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report [Fleet]." Pet. App. 7 (brackets and ellipsis in the original). This information is excluded from the definition of consumer reports.

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an FCRA claim in a case concerning a car buyer and a financing company because "the report at issue related to [no]thing other than the transaction between Brown and Chrysler"); *Borninski v. Williamson*, 2004 U.S. Dist. Lexis 29407, *8 (N.D. Tex. 2004) ("where a financial institution furnishes information based solely on its own experience with the consumer, the information is not a consumer report"); *Podell v. Citicorp Diners Club*, 859 F. Supp. 701, 705 (S.D.N.Y. 1994) (in a case involving credit cards, "the information passed by Diners Club ... cannot constitute a 'consumer report'[;] [t]he statute expressly excludes from its definition reports 'containing information solely as to transactions or experiences between the consumer and the person making the report'").

The petitioners misleadingly characterize *Mirfasihi III* as an unusual result that "[n]o circuit or district court to consider the scope of § 1681a(d)(2)(A)(i) has held ..." Pet. 10. And, "[w]hen faced with this question, the other circuits have concluded that the § 1681a(d)(2)(A)(i) exemption does not apply where at least some of the transmitted information was acquired outside of the direct relationship with the reporter." Pet. 10.

In making their arguments, the petitioners mislead the Court by presuming that a list of Fleet's mortgagors implicitly but necessarily carries with it all the credit information that was in the credit report on which Fleet relied when it first granted the loan. *E.g.*, Pet. 10-15. The petitioners argue that disclosing the mere existence of a loan conveys that Fleet determined the borrower was creditworthy, which is tantamount to disclosing all the credit information on which Fleet relied. *Id.*

It is the petitioners, not the Seventh Circuit, that are attempting to break from well-established case law. If the petitioners' argument were correct, in all the cases cited above in which a company conveyed that it had extended credit to someone, the disclosure would have been a "consumer report." But the courts in all those cases held just the opposite: the disclosure was **not** a consumer report.

In support of their novel theory, the petitioners argue that "lists of names and addresses

of individuals who meet specific criteria such as possession of ... mortgages" constitute consumer reports. Pet. 14-15 (ellipsis in the original). For this proposition, they cite *Trans Union Corp. v. Federal Trade Commission*, 245 F.3d 809, 812 (D.C. Cir.), *rehearing denied by* 267 F.3d 1138 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 915 (2002). But the petitioners fail to recognize the key difference between *Trans Union* and *Mirfasihi III*: In *Trans Union*, the company selling the lists was a national credit reporting agency that had no first-hand transactions or experiences with the consumers identified in its reports. Therefore, Trans Union's lists did not qualify for the "transactions or experiences" exclusion. In contrast, in *Mirfasihi*, Fleet was transmitting lists of **its own** mortgage customers, which fits squarely within the exclusion. *Trans Union* is inapposite.[3]

In summary, the petitioners do not point to a single case that supports their contrived theory concerning the "transactions or experiences" exclusion in the definition of consumer reports. The Seventh Circuit got it right in its dictum in *Mirfasihi III*. The Seventh Circuit's observation about this exclusion is well supported by a long list of cases,

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[3] The objectors cite 16 CFR Part 600 Appendix Commentary on § 604(3)(A) at ¶ 6 for a similar proposition — that a "prescreened list" is a consumer report. The commentary appears to be directed toward companies like Trans Union. There is nothing in the record to suggest that Fleet conducted any prescreening.

and there is no circuit split as to how this exclusion is to be applied.[4]

II. The Revised Settlement Has Been Scrutinized Multiple Times and Is Not Abusive

The petitioners, in Section III of their petition (starting at page 20), list a series of perceived abuses in the revised settlement and the opinions approving it. All of these issues are beyond the scope of the question presented for review and should be rejected out of hand. Nonetheless, plaintiff will briefly identify the petitioners' errors.

The petitioners assert that a settlement must meet "some minimum standard of fairness ..." Pet. 20 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619-620 (1997)). However, the district court **did** conclude that the settlement was fair. Pet. App. 29 (the revised settlement "is fair, reasonable, and adequate and it is again approved"). What the petitioners really mean is that the this Court should substitute petitioners' opinions for those of the district court and Seventh Circuit, which have wide latitude in approving and affirming settlements. This argument has no weight.

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[4] The Seventh Circuit also concluded that Fleet was not a "consumer reporting agency" within the meaning of the FCRA. *Mirfasihi III*, Pet. App. 7.

The petitioners next assert that the information-sharing class received nothing. Pet. 22. But the district court concluded otherwise. *E.g.*, Pet. App. 29 ("[t]he litigation value of their claims is minimal[;] ... the Settlement disgorges FMC of the profits that it made selling the plaintiffs' information and requires it to pay at least $243,000 to an organization that specializes in education and protection of privacy rights, which is likely to provide a benefit to the members of the class"). Again, the petitioners seek to substitute their judgment for the district court's.[5]

The petitioners trail off with a number of other perceived violations that the Seventh Circuit, the district court, or counsel for one or the other of the classes committed, all of which the district court and the Seventh Circuit have rejected multiple times. None of their arguments are within the scope

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[5] The objectors also misleadingly imply that the district court's fee-and-expense award was based solely on the relief that the information-sharing class obtained. *See* Pet. 1, 22. This is false. The fee-and-expense award resulted from the relief obtained for the telemarketing class as well. The district court held that the total relief justified the award. *See Mirfasihi*, 2005 U.S. Dist. Lexis 16701, *42 (N.D. Ill. 2005) (award "is a reasonable amount under both the lode-star and percentage-of-funds methods"); Pet. App. 29 (incorporating 2005 decision into 2007 decision).

of this petition or have any merit.[6] The petitioners show no overriding national importance in any of these issues and no inter-circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] The petitioners insinuate that the new counsel the telemarketing class obtained following *Mirfasihi I* was not "new" and instead negotiated the original settlement. Pet. 25. This argument is simply false and not supported by the record. To the contrary, the district court found just the opposite of what the petitioners contend. *See Mirfasihi*, 2005 U.S. Dist. Lexis 16701 at *32 ("Mr. Cantor ... was not involved in the negotiations over the initial settlement agreement").

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In The
Supreme Court of the United States

ANGELA PERRY and MICHAEL GREEN,

Petitioners,

v.

MAV MIRFASIHI, on behalf of himself and all others similarly situated, and FLEET MORTGAGE CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICI CURIAE BRIEF OF THE CENTER FOR PUBLIC INTEREST LAW, PRIVACY RIGHTS CLEARINGHOUSE, CONSUMER FEDERATION OF AMERICA, AND ESSENTIAL INFORMATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The instant case involves two major issues of concern to all four *amici curiae*. The first is the scope of the federal Fair Credit Reporting Act (FCRA). As organizations that cover consumer/regulatory issues, *amici* are concerned with lines for regulatory inclusion or exemption. In particular, *amici* regularly examine how such definitions work in relation to legislative intent. The failure to match jurisdictional reach with legislative purpose may allow for the loopholing of requirements for some. Such loopholing may then produce special exceptions for some, inimical to fair competition (*e.g.*, where those within regulatory purview suffer competitive disadvantage *vis-a-vis* those who claim exemption).

Second, *amici* are concerned about the fiduciary duties of counsel to the class in class action litigation. We are especially concerned about the possible misuse of the judiciary by defendants who "shop" cases between contending plaintiff counsel – settling with the most malleable attorney in return for fees received for minimal hourly inconvenience. Such

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record received timely notice of *amici*'s intent to file this brief, and all parties consented to the filing of this *amici curiae* brief. Their letters of consent have been filed with this Court under separate cover.

Pursuant to Rule 37.6, *amici* state that this brief was not written in whole or in part by counsel for a party, and no other individual or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

settlements may properly foreclose all absent class members from future remedy, or may effectively terminate actions by other potential class representatives.

Center for Public Interest Law. The Center for Public Interest Law (CPIL) is an academic center and statewide law firm representing the interests of consumers, and focusing on issues of regulatory law, government transparency, and legal ethics. CPIL is based at the University of San Diego School of Law and has been in existence since 1980. It publishes the CALIFORNIA REGULATORY LAW REPORTER.

CPIL and its director have been involved in this issue in multiple roles. CPIL director Professor Robert Fellmeth, Price Professor of Public Interest Law, was appointed California State Bar Discipline Monitor in 1987 by the California Attorney General, reporting to then-California Supreme Court Chief Justice Malcolm Lucas. He held that position until 1992, with CPIL serving as the Monitor's staff. Part of his work involved the study of attorney obligations and Bar enforcement of those standards. His work as State Bar Discipline Monitor culminated in reform legislation during 1989-91, including the creation of the current State Bar Court, which adjudicates the discipline of attorneys under the direct purview of the California Supreme Court.

CPIL director and principal *amici* brief author Professor Fellmeth has taught consumer law periodically from 1977, including consideration of class

action issues and the ethical obligations of counsel. He has taught Public Interest Law and Practice since 1980. He is the co-author of the treatise *California White Collar Crime* (Lexis 2002, with Thomas A. Papageorge), which includes coverage of class action issues, as well as attorney regulatory issues. Professor Fellmeth has participated in or contributed to (as counsel to an interested or involved party) 40 published appellate decisions, most pertaining to unfair competition or legal ethics issues. Over the past twenty years, he has served as an expert consultant/ witness on consumer law and attorney obligation issues in over 30 matters, including his retention by (a) the California Attorney General in proceedings before the California Commission on Judicial Performance, (b) the U.S. Attorney for the Southern District (in the prosecution of the Orange County *Cumis* counsel cases – the "Alliance"), (c) the District Attorney of Los Angeles County, (d) the District Attorney of San Diego County, and (e) the California and Washington State Bars (*e.g.*, in disbarment proceedings for unfair competition abuses by the Trevor Law Group, among others). Professor Fellmeth also served as special consultant to the California Legislature's Law Revision Commission in its consideration of the state's Unfair Competition Law (California Business and Professions Code § 17200 *et seq.*), which included class action-related flaws relevant to the instant issue.

Privacy Rights Clearinghouse. The Privacy Rights Clearinghouse (PRC) is a non-profit consumer

organization that advocates for and empowers consumers to take action to control their own personal information. Founded in 1992 in San Diego, California, the PRC responds to specific privacy-related issues from consumers, intercedes on their behalf, and, when appropriate, refers consumers to the appropriate organizations and government regulatory agencies for further assistance. The PRC has been a vocal advocate for consumers' privacy rights in local, state, and federal public policy proceedings, including legislative testimony, regulatory agency hearings, task forces, and study commissions.

The founder and director of the PRC is Beth Givens. She has developed the Fact Sheet series, consisting of more than 50 comprehensive consumer guides, as author and/or editor. She authored the encyclopedia entries on identity theft for *Encyclopedia of Privacy* (2007), *World Book Encyclopedia* (2004) and *Encyclopedia of Crime and Punishment* (2002). She is author of *The Privacy Rights Handbook: How to Take Control of Your Personal Information* (Avon, 1997) and is co-author of *Privacy Piracy: A Guide to Protecting Yourself from Identity Theft* (1999). She contributed a chapter on consumer and privacy rights to the 2006 book, *RFID: Applications, Security and Privacy*.

The PRC's interest in the instant proceeding is demonstrated by the variety of consumer-related services it offers on an ongoing basis, including (1) a hotline for consumers to report privacy abuses and request information on ways to protect their privacy;

(2) an extensive series of fact sheets on privacy issues, available in English and in Spanish; (3) a web site (www.privacyrights.org) that makes available all fact sheets and FAQs, transcripts of PRC speeches and testimony, and accounts of consumers' experiences; (4) a referral service for journalists and policymakers who are seeking victims of privacy abuses who have indicated a willingness to talk with the media and/or testify in legislative and regulatory agency hearings; and (5) a speakers service, in which PRC staff make presentations at conferences, employee training sessions, and civic and community group meetings.

Consumer Federation of America. Consumer Federation of America (CFA) is a non-profit association of some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people. CFA was founded in 1968 to advance the consumers' interest through research, advocacy and education. CFA has a long history of educating consumers about and advocating for stronger credit reporting consumer protections. For example, CFA has strongly supported the use of adverse action notices for credit and insurance purposes as essential to informing consumers about higher rates that they may have to pay as a result of the credit or insurance score. In December 2002, CFA along with the National Credit Reporting Association (NCRA) issued a report on credit scoring, *Credit Score Accuracy and Implications for Consumers*. The report documented that millions of Americans could be paying more for –

or be denied – credit, insurance, or utilities because of inaccurate or incomplete credit scores and reports. CFA has conducted consumer knowledge and opinion surveys about credit scoring, documenting that many consumers do not understand basic facts about how credit scores are developed. CFA has also published a free educational brochure for consumers with Fair Isaac Corporation entitled "*Your Credit Scores.*"

Essential Information. Founded in 1982 by Ralph Nader, Essential Information is a non-profit, tax-exempt organization. It is involved in a variety of projects to encourage citizens to become active and engaged in their communities. It provides provocative information to the public on important topics neglected by the mass media and policy makers. Essential Information publishes a monthly magazine, books and reports, sponsors investigative journalism conferences, provides writers with grants to pursue investigations and operate clearing houses which disseminate information to grassroots organizations in the United States and the Third World.

Essential Information's focus on consumer rights makes the decision below of particular concern in its impact on privacy and credit safeguard issues. Essential is also concerned about the need for class action settlements to protect the bona fide interests of class members, not merely the convenience of the courts or the monetary concerns of involved attorneys.

I. The Exemption from Fair Credit Reporting Act Compliance Inherent in the Decision Below Violates the Statute's Terms and Intent, and Will Effectively Eviscerate the Protections of the Act Relied Upon by Consumers Nationally.

The federal Fair Credit Reporting Act (FCRA, 15 U.S.C. § 1681 *et seq.*) has grown in importance over the last decade – with an exponential increase in its needed consumer protections given current and projected problems. The combination of instantaneous mass communications and the rather significant credit crisis now extant add momentous gravity to the issues raised by petitioners.

The FCRA regulates "credit reporting agencies, users of credit reports, and those who furnish information about consumers to reporting agencies." *See* 1-16 Consumer Credit Law Manual § 16.01 (Matthew Bender and Company, 2004). A consumer credit report advises those who advance credit as to the risk of lending to a given consumer. Lenders (including Respondent Fleet Mortgage Company) use such information, as do many other commercial interests. The statute includes numerous important provisions to protect consumers: required transparency, consumer right to review information being disseminated about them, the opportunity to learn of a negative report, standards applicable to agencies for data reliability, and requirements to reinvestigate and to allow consumers to correct errors. *See* 15 U.S.C. §§ 1681d, 1681g, 1681h, 1681i, 1681m, 1681s-2.

These protections concern what is now a basic underpinning of consumer welfare, if not – for millions of Americans – consumer viability. That credit report will influence whether a job offer is forthcoming, an insurance policy written, or a mortgage approved. It determines whether monies will be advanced to allow a consumer to buy a home – or to keep a home under threat of foreclosure. Under regrettable current credit card practices, banks and other creditors claim *carte blanche* to "alter the terms" of pre-existing card contracts. They then use credit reports as a basis to cut off promised credit levels, demand earlier payment, and/or increase credit card rates – sometimes from single digits to 20-30% per annum – more than ten times their cost of funds. Similarly, millions of mortgages have been advanced on a classic "bait and switch" format, with temporary "ARMs" at low interest, only to be switched to rates beyond the payment ability of millions. Credit reports then become the crucible that will determine whether alternative financing at competitive, fair rates is obtainable.

Beyond credit information error is the broader issue of privacy incursion. A leading treatise summarizes the FCRA purpose in this regard:

> As the world goes digital, consumers' records, both financial and otherwise, are increasingly vulnerable to exposure. Unregulated databases, escalating numbers of corporate mergers and the proliferation of information brokers – private investigators who specialize in obtaining computerized records – all

> threaten privacy. The Internet raises particular privacy concerns, as information sent over the Internet may pass through dozens of different computer systems, each of which can snatch and hold it. In addition, web site owners can track consumers' online behavior and thereby gather information about their preferences, often without their knowledge.

1-16 Consumer Credit Law Manual § 16.01[1], *supra*.

Because of the importance of credit reports in the modern era of mass communications, the FCRA has been written to apply broadly. The FCRA regulates the activities of credit reporting agencies, users of credit reports, and those who furnish information about consumers to reporting agencies. It was amended to reinforce its breadth by the Consumer Credit Reform Act of 1996, as part of the Omnibus Consolidated Appropriations Act of 1996 (Pub. L. No. 104-208, 110 Stat. 3009). It applies when a "person" (broadly defined) collects information on a "consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living" – on any one of those subjects. The Act applies where such information is used by a third party as a basis for denying or increasing the charge for "credit or insurance to be used primarily for personal, family, or household purposes." 15 U.S.C. § 1681a(d).

The FCRA

> is intended to protect consumers from invasion of privacy and the dissemination of

> false, outdated, or misleading information by placing various obligations on persons who use or disseminate credit information about consumers. Consumer reporting agencies must adopt reasonable procedures to ensure that the information they disseminate is accurate and up-to-date and that it is furnished only to users with certain permissible purposes.

1-16 Consumer Credit Law Manual § 16.01, *supra*, citing 15 U.S.C. §§ 1681e, 1681k, 1681l. Violations of the Act give rise to a private cause of action by affected consumers and/or trigger Federal Trade Commission involvement. 15 U.S.C. §§ 1681n, 1681o.

Because of the consumer interests here implicated, the FCRA has been written with an intended inclusionary breadth. It is not at all confined to the three major credit bureaus (Equifax, TransUnion, and Experian), but extends broadly to any person who gathers and disseminates such information about consumers to third parties. A credit reporting agency must be a "person" – with the definition "broadly defined to include any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *See* 1-16 Consumer Credit Law Manual, § 16.02, *supra*, at [4]. And the requirement that a business "regularly extends" credit to be covered is set by regulation to activate where credit is extended more than 25 times in one year. *Id.*, citing applicable FTC regulations.

The narrow exceptions that are statutorily drawn illuminate the Congressional intent in its coverage breadth. Hence, an inquiry made by an insurer, employer, or creditor that pertains only to the transaction in which it is engaged and is not disseminated beyond those two parties does not give rise to coverage. The Act as amended in 1996 excludes from the definition of "consumer report" certain common communications made to employment agencies where three specific criteria are met (including consumer consent). 15 U.S.C. §§ 1681 a(d)(2)(D) and (o). The Act excludes information communicated among gatherers who are closely affiliated with each other – but only if the consumer is given the chance to deny its disclosure to that affiliate. 15 U.S.C. § 1681a(d)(2)(A)(ii)(iii). And a creditor who reports only information about its own experience with a consumer is not issuing a "consumer report." "If, however, the creditor reports any information other than that obtained from its first-hand dealings with the consumer, it does become a consumer reporting agency subject to the Act." 1-16 Consumer Credit Law Manual § 16.02, *supra*, at 9[b].

With this background in mind, the Seventh Circuit in the case below (*Mirfasihi v. Fleet Mortgage Corporation*, 551 F.3d 682 (7th Cir. 2008)) held that a mortgage lender that gathered information beyond its own sources and then *sold* that *combined* information about customers – not 25 times but to more than one million persons – is not covered by the Act. With all due respect, a fair reading of the statute and its legislative history, through and including its 1996

amendments, illuminates this error as *in extremis* to a degree disappointing to those who regard our appellate courts with the intellectual respect they should properly command. But the rationale for granting *certiorari* to review the instant matter rests on two considerations beyond an alleged error in a statutory definition. First, this error has not been committed by other circuits. It is thus far unique to the Seventh, as petitioners argue. And the existence of a conflict among the circuits is a traditional basis for Supreme Court intervention and resolution.

Second, the urgency here goes beyond that traditional basis for review, for here we have an opening to create a "race to the bottom" that threatens not merely inconsistent application of the law between the circuits, but its potential evisceration. Compliance with the Act involves delay, expense, liability, and competitive disadvantage *vis-a-vis* those who need not comply. If any entity, much less a major financial institution, is allowed to gather information and sell it *en masse* within the states of the Seventh Circuit – free and clear of any transparency, accuracy standards, consumer access opportunity, obligation to reinvestigate or correct, or vulnerability to private remedy or FTC enforcement for such noncompliance – that has implications in the nationwide credit reporting agency market. Those states will become attractive magnets for corporate headquarters from which to disseminate data gathered worldwide and disseminated worldwide. What limitation here would impede such evasion of the Act by mortgage lenders or others similarly situated? What are the reasonable

economic consequences? What are the likely implications for credit report consumer protection in relation to applicable Congressional intent?

Apparently, the circuit court did not understand what Fleet Mortgage was doing and how it related to the FCRA. Fleet clearly engaged in credit report checks in its evaluation of borrowers. It reviewed and evaluated information from the same Experian, TransUnion, and Equifax agencies commonly used and incorporated that information in its own rating decisions. It then sold that information through its own offices. The problem here is not one of intellectual property copyright infringement. Neither *amici* nor petitioners care whether the Fleet information properly attributes its sources. The problem the Seventh Circuit did not grasp is that the three major primary source agencies (Equifax, TransUnion, and Experian) are all complying with the FCRA. Accordingly, consumers have the benefit of that Act's important set of protections about notice when credit is denied based on such information, transparency, opportunity to correct, etc., as noted above. But if the Seventh Circuit's ruling stands, what does a consumer do when, for example, Experian's information is repackaged by Fleet for sale and subsequent credit denial? What if there is an error with Experian, a consumer gets it corrected under the FCRA, but Fleet has already incorporated that error in its credit report? Does the consumer have the right to notice that Fleet is the source of his rejection or higher interest or lower credit line? Fleet is purportedly not

within the FCRA that requires such notice. What does he do where he fortuitously learns that Fleet is the source of the ding? How will he get Fleet to make a correction? Even if Fleet is simply repeating an earlier, erroneous report from Experian, the remedy Congress created is now impotent. It is out there and is now spreading via innumerable conduits exempt from the statute. The consumer caught in the nightmare of false credit information, sometimes stimulated by egregious identity theft, already has a mountain to climb to undo what has been done to him under the FCRA with the three largest agencies. The Seventh Circuit here creates more than a mountain – it moves resolution out of the solar system.

There are lots of Fleet Mortgages. And if they can make this gathering and sale of credit-related information to third parties which are immune from the FCRA (they are reporting credit information about many thousands of Americans to many thousands of creditors, but they are apparently not a "reporting agency"), why would not many more mortgage companies seek to pick up money by such information sale? They are without liability or accuracy obligation. Are they going to *sua sponte* recheck their sources for correction? Why? The FCRA allegedly does not apply to them.

These petitioners before this Court present to it in their petition subject matter of special concern involving the effective abnegation of Congressional intent, and reasonably projected irreparable injury for millions of Americans. *Amici curiae* acknowledge

that rhetorical hyperbole in claims to draw the attention of this Court, given its necessarily limited selection of cases, may be all too common. But *amici* respectfully ask this Court to consider with some care: (a) the significance of consumer credit reporting and consequent credit decisions on the American consumer in 2009; (b) the rationale behind the FCRA and its palliative effects over the past two decades on credit – limiting somewhat error and abuse; and (c) the impact of the categorical exemption from those protections created by the Seventh Circuit in the decision below.

This is not merely another case of "conflict among the circuits." The Court is here presented with such a conflict in a competitive market setting where commercial lenders and data gathering enterprises may move geographically to provide effective evasion of a principal consumer protection statute at a time when its coverage has never been more important.

II. The Approval of a "Sweetheart" Class Action Settlement Over Responsible Objection Gives this Court an Opportunity to Establish Proper Class Approval Standards for Judicial Branch Enforcement of Statutes.

The importance of the class action mechanism is well-illustrated in the case at bar. The cost of bringing an individual case of statutory noncompliance with the FCRA inhibits its presentation in any judicial forum. Even if such disputes could be resolved

on the basis of numerous small claims actions, that jurisprudential option has three disadvantages: (a) The relatively low maximums for recovery (commonly $5,000 to $10,000) might not match the actual damage for many consumers, precluding their full recovery; (b) the very partial disgorgement of unjust enrichment from violators may not provide any effective deterrent consequence for statutory compliance; and (c) the fragmentation of similar questions of fact and law into hundreds or thousands of individual adjudications yields inconsistencies in results and diseconomies of scale. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 809 (3d Cir. 1995). A rational society combines similar factual and legal issues into manageable packages for efficient adjudication.

But the class action format has some features that require judicial adjustment from typical adjudicatory practice. The American system with its English origins departs from the Napoleonic model prevalent in much of the world. We rely more on a contest before a passive court. That contest works well to produce an optimum outcome where (a) the contending interests have an approximate balance in advocacy resources, and (b) the parties contending before the court have a *bona fide* dispute with effective representatives of all relevant points of view. To address the former flaw, constitutional law doctrine works to protect an adversarial system by subsidizing

that weaker side (*e.g.*, *Gideon* counsel for criminal defendants,[2] *Lassiter* counsel for parents threatened with the loss of parental rights,[3] required due process steps where the state is involved in takings,[4] affirmative obligations of prosecutors to provide discovery, etc.). And state bars and public agencies attempt to redress imbalances through legal aid, *pro bono* contribution, and other means to provide access to the courts and advocacy before them. Liberal standing policies and permissive joinder also allow for plaintiff opportunity to reach the courts. And class action allowance addresses the starkest deficiency in court enforcement of statutory compliance – the ability of thousands or millions to combine to reach the courts and argue their common interest. But this last ameliorative mechanism, however necessary, threatens the underlying assumption behind the court's passive role – that those before the court represent *bona fide* contending interests.

The concern over this dynamic reaches its zenith in class action settlements. Here, a given law firm and a "class representative" purport to represent an often large class of persons whose cumulative stake is substantial. The defendant faces serious liability. There is a strong incentive for a negotiated settlement. Counsel for the class often has substantial

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[2] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[3] *Lassiter v. DSS*, 452 U.S. 18 (1981).

[4] *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972).

client control over the class representative that it (practically speaking) generally selects. The defendant's interest is clear – to minimize losses. It makes economic sense for defendant to pay a substantial fee to plaintiff's counsel in return for a class settlement that (a) minimizes the possible huge financial payment to the class, (b) lowers transactions costs – including large hourly-based fees to defense counsel, and (c) maximizes collateral effect to foreclose possible suits by others (with perhaps higher demands for class recompense). Obviously, out of almost two million nationally licensed attorneys, finding a number who are willing to take six or seven figures in return for token payment to absent class members and the provision of substantial immunity from other plaintiff class representatives and counsel is not difficult.[5]

Federal Rule of Civil Procedure 23 and court precedent rely on several mechanisms to assure the due process rights of absent class members and other existing or potential alternative or competing class representatives and counsel. First, court decisions make clear that class representatives must be "adequate." Rule 23(a). Not only must their claims be typical, but they must be capable of and interested in

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[5] The public interest group Public Citizen has devoted substantial resources to tracking and objecting to proposed settlements in some of the problem class actions, including the coupon cases where the benefit to the class is actually a marketing tool for defendants to increase profits (*see* www.citizen.org for presentation and discussion of various class settlement abuses).

carrying the ball for the absent class members whose grievance they litigate. Second, the class representatives owe a fiduciary duty to the other members of the class to not take a disproportionate reward nor to facilitate high attorney recompense in return for a minimal judgment that then bars other litigants. Third, there is required notice of class certification and of settlement terms – including the proposed fees to be paid counsel. Fourth, the court must give objectors a chance to be heard under FRCP 23(e) and conduct an appropriate hearing so the court may necessarily find that the settlement is "fair, adequate and reasonable, and not a product of collusion."[6] These steps are intended to assure both FRCP compliance and due process in the judiciary's critical grant of finality (collateral estoppel effect).[7] Counsel for the class has a critical role in these steps. The adequacy of the class representative can and often does include consideration of the adequacy of counsel to represent the interests of the class, including background, resources, and competence. And counsel has a fiduciary duty of the highest order to the client that necessarily includes the obligation to honor the fiduciary duty of the client to the class.

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[6] *Joel C. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000).

[7] *See* FRCP 23(e) requiring approval; *see also Duhaime v. John Hancock Life Insurance*, 183 F.3d 1 (1st Cir. 1999), requiring notice to the court of objectors.

The problem is that these measures often fail in the crucible of actual litigation.[8] They fail because of an understandable trial court mind-set that encourages settlement. The courts will want to reward counsel who are professionally amicable and constructive, who seek common ground, who remove complex and time-consuming cases from crowded dockets. An attorney or law firm who "objects" where the other parties have struck an agreement may be viewed, as the common cliché indicates, as the "skunk at the garden party." The instant case presents a stark example of the influence of that common and unsurprising judicial instinct. Here we have a class representative and their counsel who have brought to the class a marginal benefit. Apparently, the 200,000 in the part of the class who bought products from the telemarketers were given access to a claims process, but the 1.4 to 1.6 million larger subclass represented by the objectors got nothing. The separate claims of all class members are now barred. No apparent corrected compliance with the FCRA was ordered. A contingency fee of above 50% of the amount received by clients is generally viewed as excessive if not unconscionable.[9] In this case, the major subclass will

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[8] *See* the helpful symposium: *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* reprinted in the Cornell Law Review at 80 CORNELL L. REV. 811 (1995).

[9] Most expert commentary places an appropriate common fund contingency fee in the 20% to 40% range. We can find no examples of approval over 50%. *See* Jerold S. Solovy, Testimony in Support of the Fund Theory Before the Honorable Albert

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receive no relief, while its purported counsel will receive a court awarded fee of $750,000.

The objectors have no apparent motivation apart from serving the class to a more substantial degree. They have litigated this matter over four years, into the appellate arena, and into a third settlement version. The record does not include respective hours, nor does this appear to be the basis for the attorney fee award here rendered. But the objectors, clearly engaged in comparable litigation efforts from their point of objection forward, were awarded $18,000, or 2.5% of the amount received by class counsel who operated cooperatively with defendants and their counsel. The message transmitted to the courts and counsel of the nation is unsubtle:

> Strike a deal based on defense direction, and we'll back it, enforce it, give it finality, and foreclose the due process rights of other grievants. We'll do so regardless of its terms

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Green in *Hoffman v. First National Bank* (June 1990), Illinois CLE Handbook at § 10.43. Another source notes:

> " . . . the courts, in search of fairness and judicial economy, make comparisons of the fees requested with the percentages awarded in other cases. The court in *In re King Resources Company Securities Litigation*, 420 F. Supp. 610 (D.Colo. 1976), cited its research showing that fee allowances in class actions under the federal securities laws have been 'within the generally accepted range of twenty percent (20%) to thirty percent (30%) of the benefits bestowed upon the class.'" Holstein and Fietsam, FEDERAL CIVIL PRACTICE, Class Actions, § 10.33 "The Customary Fee," (1993).

> (even if it brings little discernible benefit to those allegedly represented in this process, bars hundreds of thousands from individual remedy, and creates *in futuro* immunity for the defendant from FCRA claims). If counsel wishes to participate in an objection, this is what will happen.[10]

This Court and some of the circuits have grappled with this problem obliquely in several cases. Ironically, this same Seventh Circuit addressed an analogous problem in *Crawford v. Equifax Check Services Inc.*, 201 F.3d 877 (7th Cir. 2000). Three competing class actions were filed against the defendant under the Fair Debt Collection Practices Act (improper debt collection letters under 15 U.S.C. §§ 1692e and 1692g). The *Crawford* class was certified and settled by the trial court on an FRCP 23(b)2 injunctive basis, abandoning the 23(b)3 damage class and all damage claims, but foreclosing class status for the other two pending actions. The other two class representatives were denied intervention status to effectively object. The Seventh Circuit noted that "a representative plaintiff acts as a fiduciary for the others" (*id.* at 880) and concluded: "All questions of notice and opt-out aside, the settlement is substantively troubling. Crawford and his attorney were paid handsomely to go away; the other class members received nothing . . . and lost the right

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[10] For a discussion of the context of prior common mistreatment of objectors, *see Silencing the Objectors*, 15 GEO.J.LEGAL ETHICS 177 (2001).

to pursue class relief" (*id.* at 882). The "handsome" attorney fee received in *Crawford* was $78,000. The court voided the settlement and reversed the denial of intervention (objection) rights to the class representatives of the two competing actions.

Two years later, the Seventh Circuit decided *Reynolds v. Beneficial National Bank,* 288 F.3d 277 (7th Cir. 2002). The case involved competing class actions brought against defendants who loaned money against anticipated IRS refunds to taxpayers. The court discussed the problem of the "reverse auction," defined as "the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with the hope that the district court will approve a weak settlement that will preclude other claims against the defendant" (citing *Blyden v. Mancusi*, 186 F.3d 252, 270 n.9 (2d Cir. 1999)). The *Reynolds* court continued: "The ineffectual lawyers are happy to sell out a class they anyway can't do much for in exchange for generous attorneys' fees, and the defendants are happy to pay . . . " (*id.* at 282). The court discussed in detail the deficiencies of the trial court in examining aggressively the actual value of the case. And the settlement amount in *Reynolds* involved $25 million, with over $20 million devoted to class recovery. The court added: "It is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally. This participation is encouraged by permitting lawyers who contribute materially to the proceeding to obtain a fee" (*id.* at

288). However, that fee requires that counsel "produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class" (*id.*). Presumably, that condition precedent might properly apply *a fortiori* to counsel for the class representative of the certified class who render little benefit as well.

This Court grappled with these problems in the leading case of *Amchem Products, Inc., et al. v. George Windsor, et al.*, 521 U.S. 591 (1997). This set of asbestos injury-related cases raised class action settlement difficulties in daunting complexity. The *Amchem* decision upheld the Third Circuit's vacation of the district court's anti-suit injunction and its decertification of the class. The basis for the decision partly rested on concern for absent class member due process foreclosure, including victims who would later arise and be limited in remedy to a class payment system not including consideration of their circumstance. The case involved what the Court described as an uncommon "sprawling" class definition, and lacked the discrete subclasses that might more precisely tailor remedies to the different victim situations extant. The concern over the fate of ancillary subclasses in *Amchem* appears to have application here, except this subclass is not a speculative group of future asbestos victims, but the vast majority of those who had their private financial information gathered by major agencies, and repackaged in a kryptonite envelope that most of them will not know about and none of them will pierce.

This Court urged in *Amchem* heightened scrutiny of class action settlements, noting a large number of such cases then occurring.[11] The Court noted that the courts need not inquire into management problems of a trial since no trial would occur with a settlement, but emphasized: "But other specifications of the rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context" (*id.* at 620). And the Court pointedly made reference to the class settlement problems this case suggests still exist. Here we have, as with *Amchem*, a large group of class members (a subclass eight times larger than the one receiving symbolic relief) receiving not a benefit, but a bar to their future ability – and the future ability of the FTC – to apply the statute to this or similar defendants.

Amici curiae respectfully suggest that a clear message to the judiciary in the field is warranted: Their obligation to review class settlements under FRCP 23(e) is properly mindful of the economic incentives that may prevail, that may pervert the adjudicative function, and that may compromise the proper enforcement of statutes consistent with Congressional intent and judicial integrity.

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[11] 521 U.S. at 618, citing T. Willging, L. Hooper, & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 61-62 (1996).

CONCLUSION

For the reasons presented above, *amici curiae* respectfully ask this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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